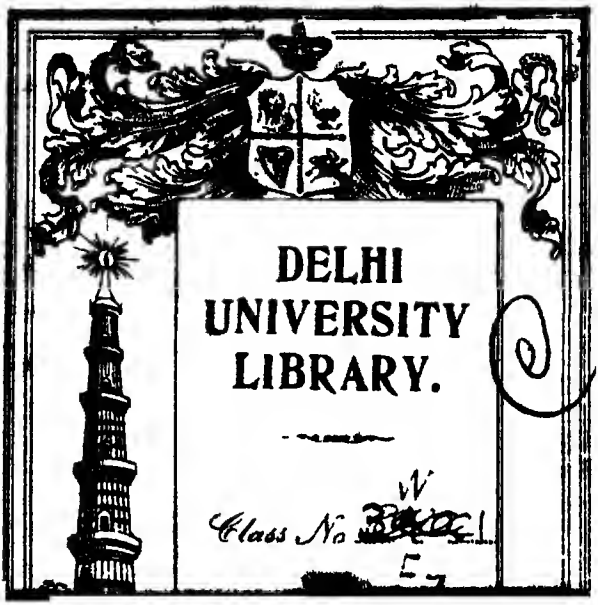
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CONCERNING JUSTICE

BY

LUCIUS ATKEMERY

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TO MY CHILDREN

HENRY CROSBY EMERY
ANNE CROSBY EMERY ALLINSON

THE ADDRESSES CONTAINED IN THIS BOOK WERE DELIVERED IN THE WILLIAM L. STORRS LECTURE SERIES, 1914, BEFORE THE LAW SCHOOL OF YALE UNIVERSITY, NEW HAVEN, CONNECTICUT.

CONTENTS

CONCERNING JUSTICE

contrast, I would recall to your minds another and even more fundamental question asked twenty centuries ago in a judicial proceeding in distant Judea. It is related that when Jesus, upon his accusation before Pilate, claimed in defense that he had "come into the world to bear witness unto the truth," Pilate inquired of him "What is truth?"; but it is further related that when Pilate "had said this he went out again unto the Jews." Apparently he did not wait for an answer. Perhaps he repented of his question as soon as asked and went out to escape an answer. Men before and since Pilate have sought to avoid hearing the truth.

Indeed, however grave the question, however essential the answer to their well-being, there does not seem to be even now on the part of the multitude an earnest desire for the truth. Their wishes and emotions cloud their vision and they are reluctant to have those clouds brushed aside lest the truth thus revealed be harsh and condemnatory. The truth often causes pain. As

said by the Preacher, "He that increaseth knowledge increaseth sorrow." People generally give much the greater welcome and heed to him who tells them that their desires and schemes are righteous and can be realized, than to him who tells them that their desires are selfish or that their schemes are impracticable. It has always been the few who have sought the truth, resolute to find it and declare it, whether pleasant or unpleasant, in accord with the wishes of mankind or otherwise. Such men have sometimes suffered martyrdom in the past, and often incur hostility in the present, even when seeking that truth on which alone justice can securely rest.

Nevertheless, so closely linked are truth and justice in the speech, if not the minds, of men, there should be some consideration of Pilate's question. Whether truth is absolute or only relative has been perhaps the most actively discussed topic in the field of philosophy for the last decade. Into this discussion, however, we need not enter, for such discussion is really over

the problem of determining the proper criterion of truth. Wherever be this criterion, whether in some quality of inherent rationality or in some utilitarian test of practicability, the truth itself has some attributes so far unquestioned and of which we may feel certain as being inherent, necessary, and self-evident.

Truth is uncompromising. It is unadaptable; all else must be adapted to it. It is not a matter of convention among men, is not established even by their unanimous assent, and it does not change with changes of opinion. It is identical throughout time and space. If it be true now that since creation the earth has swung in an orbit round the sun, it was true before the birth of Copernicus and Galileo. If it be true now that the sum of the three angles of a triangle is equal to the sum of two right angles, it was always true and always will be true, true at the poles and at the equator, true among all peoples and in all countries, true alike in monarchies, oligarchies, and democracies.

Truth is also single. There are no different kinds of truth, though there may be innumerable kinds of propositions of which truth may or may not be predicated. Whichever criterion the philosophers may finally agree upon, it will hold in all propositions alike. The truth of a proposition in mathematics is the same as the truth of a proposition in any other science, physical, social, political, or theological. It can be no more nor less true in each and all. Again, in every science, social and political as well as others, and as to every proposition in any science, the truth is to be discovered, not assumed by mere convention; and men must discover it and discover it fully at their peril. Failure even after the utmost effort will not be forgiven. If the truth be found it will be a sure guide in life. If it be not found the lives of men will so far go awry. That it may be difficult to find, that we may never be sure we have found it, makes no difference

Are there any attributes of justice of which we can speak so confidently as being necessary,

inherent, and self-evident? That justice ranks next to truth, if not with it, seems to have been, and to be, the general judgment of mankind. It has engaged the thought and fired the imagination of the greatest minds. A few quotations from such, ranging from ancient to modern times, will illustrate this. The Hebrew Psalmist gloried that "justice and judgment" were the habitation of Jehovah's throne. Aristotle wrote, "political science is the most excellent of all the arts and sciences, and the end sought for in political science is the greatest good for man, which is justice, for justice is the interest of all." Early in the 12th century the jurist Irnerius, distinguished for his learning and for his zeal in promoting the revival of the study of law and jurisprudence, and also as the reputed founder of the famous Law School at Bologna, imaged justice as "clothed with dignity ineffable, shining with reason and equity, and supported by Religion, Loyalty, Charity, Retribution, Reverence, and Truth."

Six centuries later Addison, famed as a clear

thinker and writer, thus wrote of justice: "There is no virtue so truly great and godlike as justice. . . . Omniscience and omnipotence are requisites for the full exercise of it." Almost in our own time Daniel Webster, called in his day the great expounder and even now reckoned among the greatest of men intellectually, in his eulogy upon Justice Story thus apostrophized justice: "Justice is the great interest of man on earth. It is the ligament which holds civilized beings and civilized nations together. Wherever her temple stands and so long as it is duly honored, there is a foundation for social security, general happiness, and the improvement and progress of our race." Perhaps, however, none of these laudations is so vividly impressive as is the pithy remark of an old English judge that "injustice cuts to the bone."

But what is this justice, declared to be so great a virtue, so ineffable, so supremely important? I have said we feel certain of some attributes of truth. Do we know or can we know anything

certain about justice? Is it something above and apart from the will of men, or is it simply a matter of convention among men? Is it immutable, or does its nature change with changing times and conditions? If mutable, does it change of itself or do men change it? Is it universal or local, the same everywhere or is it different in different localities? Is it the same for all men and races of men or does it differ according to classes and races? Again, is it single or diverse in its nature? Is there more than one kind of justice? We hear of natural justice, social justice, industrial justice, political justice. What do they who use *those terms mean by them? Do nature, so*ciety, industry, politics, each have a different criterion? Still again, and briefly, is justice an inexorable law like the law of gravitation or can its operation have exceptions? Is it simply a quality of action or conduct, or, as stated by Ulpian, is it a disposition or state of mind? Finally, is it a reality or, as Falstaff said of honor, is it after all "a word," "a mere scutcheon?"

I am not so presumptuous as to venture an answer to any of these questions except perhaps the last. As to that, I appeal to our consciousness, to our innate conviction that there does exist something, some virtue, some sentiment, however undefinable in terms, holding men together in society despite their natural selfishness, and without which they would fall apart. It is this virtue, this ligament of society, that we call justice. We feel that the word is not a mere word, but that it connotes a vital reality in human relationship. If this reality be ignored, men cannot be held together in any society.

If justice be the greatest good, as so generally asserted, then its negative, or injustice, must be the greatest evil. Hence error in men's opinions of what is justice will work that greatest evil. Society as a whole is liable to error in respect to justice; has often been mistaken in the past and may be mistaken today. The individuals composing society are seldom, if ever, wholly disinterested and dispassionate in their judgments.

Each individual is prone to believe that what is apparently good for himself or his group or class, is in accord with justice. Himself persuaded that he is battling for justice, he does not see that he may be battling only for some advantage over others, for some individual relief from common burdens, for some privilege not to be accorded to others; does not see that what he is battling for may cause injustice to others. Through ignorance of the real nature of justice, the grant to one of his plea for what he calls justice may work grievous injustice to others. So when altruists, warm with sympathy, obtain the enactment of laws intended for the betterment of the less fortunate, they may at times do injustice to others and even to those they hoped to benefit. History records many instances where laws intended to insure justice had the contrary effect. Many a statute designed to prevent oppression has itself proved oppressive in operation. Many a theory of justice has been found to work injustice. A conspicuous and familiar instance is

found in the history of the French Revolution. The Jacobins believed that their theories if given effect would usher in the reign of justice in France. They obtained power and exploited their theories only to bring in the Reign of Terror, that reign of terrible injustice.

As mistakes and grievous mistakes have been made in the past as to what is justice, so they will be made now and in the future, and can be lessened only by greater wisdom and forethought, by greater effort to consider justice apart by itself, with philosophical detachment, with minds unclouded by pity, sympathy, charity, and other like virtues, on the one hand, or by envy, hate, prejudice, and like evil sentiments, on the other. True, men are more enlightened now and education is more general, but society is more complex, with more diverse and conflicting interests, than formerly. The social mechanism is now so intricate that even a slight disturbance in one part may disarrange the whole. Injustice to one may injure the many. Hence the duty of ascertaining

as completely as possible the real nature of justice is as imperative today as ever. As declared by Ulpian, this duty is especially incumbent upon those who have to do with the framing or administration of the laws, since justice can be enforced only by law.

In any inquiry into the nature of justice we get little help from the wisdom of the ancients. They wrestled with the question but seem to have been as puzzled as we of today. Indeed, Plato represents the sage Socrates as frankly confessing his inability to answer satisfactorily the persistent question "What is justice?" The question comes up for discussion by Socrates and some friends at the home of Cephalus at the Piræus. Socrates criticizes and punctures the definitions advanced by the others until Thrasymachus, apparently with some heat, challenges Socrates to give an answer of his own to the question "what is justice?" and not to content himself, nor to consume time, with merely refuting others. After some further discussion of various

aspects of the question, Socrates finally says, "I have gone from one subject to another without having discovered what I sought at first, the nature of justice. I left the inquiry and turned away to consider whether justice is virtue and wisdom, or evil and folly, and when there arose a further question about the comparative advantages of justice and injustice I could not refrain from passing on to that. The result of the whole discussion has been that I know nothing at all. I know not what justice is and therefore am not likely to know whether or not it is a virtue, nor can I say whether the just man is happy or unhappy." Granting that the confession may have been intended ironically, the further discussion did not result in any practical solution, even if in one possible in Plato's ideal, but impossible, state. Indeed, the inquiry is not yet closed and will not be until the millennium.

Still, upon a question so old, so important, so persistent, so ingrained in human society, and even now receiving such diverse and conflicting

answers, a brief consideration of the earlier beliefs and theories may not be useless. As said by Bishop Stubbs, the historian, "The roots of the present lie deep in the past and nothing in the past is dead to him who would learn how the present came to be what it is." The roots should be examined by him who would understand the tree.

In Homer we get a glimpse of a theory of his time, to wit, that each separate decision given by the magistrate in any litigated controversy was furnished to him by Zeus specially for that case. The Greek word for such a decision was *themis,* and it was supposed that somewhere in the Pantheon was a corresponding deity whose special function was to furnish the appropriate themis for each case. This deity was shadowily personified as the goddess Themis, the daughter of heaven and earth, the companion and counselor of Zeus. It was she who summoned gods and men to council and presided unseen over their deliberations. Hence she came to be regarded

as also the spirit of order without which the Greek philosophers, notably Plato, held there could be no justice.

This theory that justice and even the laws were but the will of deity, revealed in various ways, was long generally accepted. In Rome, in the time of the kings, the king was the Pontifex Maximus, and as such, with the help of the College of Priests, declared the laws and decided lawsuits. For some time also under the Republic, when a vote was to be taken in the Comitia upon a proposed law, the question was thus put: "Is this your pleasure, O Quirites, and do you hold it to be the will of the gods?" Under the Empire, despite the reasoning of many philosophers and lawyers that the Emperor derived from the people his power to make laws and declare the law in any given case, he assumed and was assumed to have derived the power and inspiration solely from the gods.

The early Christian Church also preached the doctrine that the ruling power in the state, how-

ever established, was ordained of God and as such was entitled to the obedience of the pious. This belief that justice and judgment were simply the will of God, to be ascertained, not by reason but by other means, was so general and deep that such crude devices as trials by ordeal and battle were often resorted to for determining guilt or innocence and other questions of fact. Indeed, resort to such expedients for determining questions of law, as well as questions of fact, was not unknown. In the tenth century under the Saxon King Otto a question arose whether upon the death of their grandfather his grandchildren by a prior deceased son should share in the inheritance along with their surviving uncles. The king ordered a trial by battle, which being had, the champions for the grandchildren were the victors. It was therefore held to be the divine will that grandchildren by a prior deceased child should inherit direct from their grandfather. I may here remind you that trial by battle was not formally abolished in England until well into the

19th century. And there is even now professed a belief that the will of God can be ascertained by counting ballots. "Vox Populi Vox Dei" is still a shibboleth.

But the doctrine that justice is heaven born, superior to and controlling the opinions and wills of men, did not escape challenge even in ancient times. Those sects of philosophers known as Epicureans and Sophists, consistently with their theory of the nature of virtue in general, maintained that justice was merely a name for such conventions among men as they should adjudge best for their own utility and happiness. The most vigorous champion of this latter theory appears to have been one Carneades, a Greek philosopher of the second century B.C., said to have been the founder of the third Academy and expounder of the philosophy of probabilities and to have possessed the acutest mind of antiquity. In a course of lectures at Rome he stated the arguments for the orthodox view of justice and then boldly assumed to answer them and demon-

strate that justice was not a virtue at all as virtue was defined by the philosophers, but was merely a convention; was what men should agree to be a sound basis for the maintenance of civil society, and hence that it varied with times, places, circumstances, and even opinions. This argument evidently had much effect upon public opinion, for Cato urged in the Senate that Carneades be banished because dangerous to the state.

So great was the influence of Carneades that a century later Cicero, a disciple of the Stoic school of philosophy, thought it necessary to refute him specifically as the chief heretic, and to uphold the orthodox theory against his arguments. Cicero denounced with eloquent warmth the doctrine that utility was the foundation of justice. He declared that, not utility, but nature, was the source of justice, that justice was a principle of nature, the ultimate principle behind all law. To abridge the familiar quotation from his "De Republica," "There is a law which is the same as true reason, accordant with

nature, a law which is constant and eternal, which calls and commands to duty, which warns and terrifies men from the practice of deceit. This law is not one thing at Rome, another at Athens, but is eternal and immutable, the expression and command of Deity." In his treatise "De Legibus" he declared that men are born to justice; that right is established not by opinion but by nature; that all civil law is but the expression or application of this eternal law of nature; that the people or the prince may make laws but these have not the true character of law unless they be derived from the ultimate law; that the source and foundation of right law must be looked for in that supreme law which came into being ages before any state was formed.

This theory of the Stoics so eloquently urged by Cicero was practically the *jus naturale* of the Roman jurists of classical times, though more moderately expressed by them. It does not seem to have been wholly academic, but to have been actually applied at times. In his history

of Rome, Mommsen relates that even during the nearly absolute sway of Sulla, after the fall of Marius, the Cornelian Laws enacted to deprive various Italian communities of their Roman franchise were ignored in judicial proceedings as null and void, also that, contrary to Sulla's decree, the jurists held that the franchise of citizenship was not forfeited by capture and sale into slavery during the civil war with Marius. Later, when the church became a power in the state there are instances where laws adjudged to be contrary to the laws of God were refused effect. In England as late as the middle of the 17th century Chief Justice Hobart, a judge of high repute, asserted that "even an act of Parliament made against natural equity, as to make a man judge in his own case, is void in itself for the laws of nature are immutable and they are the laws of laws." In the 18th century Blackstone assented to the doctrine of a *jus naturale* and wrote of it: "This law of nature being coeval with mankind and dictated by God him-

self is of course superior in obligation to any other. . . . No human laws are of any validity if contrary to this, and such of them as are valid derive all their force and all their authority, mediately or immediately, from this original." True, Blackstone combated the doctrine that duly enacted statutes were to be held void if the judges thought them contrary to reason, but he admitted that that extreme doctrine was more generally held. In this country the doctrine of a higher law than the Constitution even, and to be obeyed rather than the Constitution and laws enacted in accordance therewith, has had and even now has earnest advocates.

But the contrary doctrine of Carneades and the Sophists would not down. After Cicero and the civilians, after Hobart and Blackstone, came our modern utilitarians, or sophists, Bentham, Mill, Austin, and others, who have vigorously maintained with weighty arguments the utilitarian theory of justice; and that theory is now generally accepted by lawyers and statesmen as

at least the most workable theory in human affairs. There still exists, however, in the minds of many the belief that above and behind all the turmoil and strife of politics, all the flux and reflux of social movements and public sentiment, the confusion of enactments, amendments, and repeals of statutes, the swaying of judicial opinion, there is some law of nature or in nature, some criterion, which if ascertained and obeyed would be perfect justice.

This question of the origin, the foundation of justice, whether it be of God or of men, seems to have been much more debated than the question what is the nature of justice whatever its origin or foundation. Yet some attempts, other than those attributed to Socrates, have been made of old to give a definition of justice. The earliest description I have found is that of the early Pythagoreans, who, in accordance with their practise of symbolizing the virtues by geometrical figures, designated justice by the square, and the just man by the cube. Plato seems to

have had a theory of justice when he wrote in the "Gorgias," "Nature herself intimates that it is just for the better to have more than the worse, the stronger than the weaker, and in many ways she shows that among men as well as among animals justice consists in the superior ruling over and having more than the inferior." In these days our first impulse may be to denounce Plato's statement as altogether wrong if not worse. We should remember, however, that Plato was not considering any altruistic virtue such as kindness, sympathy, benevolence, generosity and the like, but only what nature indicates to be the essential condition of successful association. Thus interpreted, are we prepared to confute the statement? Do we know of any state of society in human or animal life at any time, past or present, of which the contrary of Plato's statement is true?

But passing over all other attempts of the ancients to define justice, none of which seems to have been much regarded by contemporary opin-

ion, I will only cite the most famous, that by Ulpian, the renowned jurist of the best period of Roman jurisprudence, whose writings were most drawn upon by the learned compilers of the Institutes and Digest of Justinian, viz., "Justitia est constans et perpetua voluntas jus suum cuique tribuendi," or "Justice is the constant and perpetual will to render to every one his right." This definition was adopted by the compilers as correct and made the introduction to the Institutes. It thus received the imperial sanction and was quoted wherever the law of Rome prevailed, down through medieval times and later, almost as if it were an inspired or at least authoritative definition not to be questioned. But notwithstanding the acclaim with which this definition was hailed, I question that it was any improvement on that of Aristotle, who tersely defined justice as "that virtue of the soul which is distributive according to desert." Indeed, I think Aristotle was nearer the mark.

Upon the revival of the study of law and

jurisprudence in the 11th and 12th centuries several of the more famous jurists of that time, Azo, Irnerius, Placentinus and others, essayed definitions of justice, but they do not seem to have improved upon Ulpian. Their definitions were vitiated by theological assumptions and none of them has become a text for commentators or students. Neither in modern times has any definition of justice been suggested which has received such universal assent as did that of Ulpian in his time and for centuries afterward. We may therefore return to Ulpian's definition as our point of departure, since his definition is substantially that suggested earlier by Aristotle, and observations on the later will also apply in many respects to the earlier.

Ulpian's definition is elegant in style, but it does not carry us very far in our inquiry. We are told indeed that justice is a state or disposition of the mind, the disposition to render to everyone his right or, as put by Aristotle, is the disposition to distribute according to desert. It

was this statement that captured the medieval jurists and which they made their text, but it is now regarded as incomplete and even inaccurate. One may have the disposition, the desire, the will, to render to every one his right, but unless he can know what is his fellow's right he may unwittingly fail to accord it to him and thus unwittingly do injustice. It evidently is not enough to have the disposition or will, hence the definition is incomplete, and any definition is incomplete which does not furnish a criterion for determining what is the given man's right.

But the definition as far as it does go is not strictly accurate. The man of malevolent disposition who would wrong his fellow if he dared, may yet, to avoid unpleasant consequences to himself, render fully to every other man his right. It would seem, therefore, that justice is an attribute or quality of conduct rather than a disposition or state of mind, and of conduct toward others rather than of conduct toward one's self. It is only of the conduct of men in

their relations to other men that we can predicate justice or injustice. One's conduct may result in good or evil to himself and so be wise or unwise, but assuming, what probably is never the fact, that it affects only himself, in no way affects any other, his conduct is neither just nor unjust. Robinson Crusoe, until the arrival of the man Friday, had no occasion to consider our problem.

But, admitting that each man's conduct, whether active or passive, does affect some other person, what is the criterion by which to determine the justice or injustice of that conduct? It is not enough to say that if the conduct in any degree impedes the other person in the enjoyment of any of his rights it is unjust, otherwise not; for then the question comes to the front, what is the right of that other in the given case? Indeed, this latter question is the crux of the problem of justice. The derivation of the word "justice" also shows this. The Latin *justitia* or *justitium* according to some scholars is compounded of *jus*, right, and *sisto* or *steti*, to place,

or to cause to stand, and hence the whole word may be held to signify the maintenance of *jus* or right. With the question of *jus* or right correctly answered, the problem of justice is practically solved. The right of the one being known, the effect of any particular conduct of another on that right, and consequently its justice or injustice, is determinable with comparative ease. Hence to make progress in our inquiry we must consider the problem of rights, for we almost instinctively accept as correct so much of Ulpian's definition as implies that justice is to be predicated of the act of rendering to everyone his right. We instinctively feel that if we render to another his full right we do him full justice, and that if we ourselves are deprived of any right we suffer injustice. What is his or our right is therefore the real question. This will be our next subject for consideration.

CHAPTER II

THE PROBLEM OF RIGHTS. DIFFERENT THEORIES AS TO THE SOURCE OF RIGHTS

THE problem of Rights is also centuries old. There have been in later years glowing tributes to human rights even more than to justice, though the sentiment of rights is egoistic, while that of justice is in some measure altruistic. There have also been diverse opinions in the past, as now, as to the source, foundation, and nature of what are called Rights, as there were and are of justice. A brief review of these opinions and of the changes in them may present the problem more vividly.

In patriarchal times there could be no political questions about rights. The head of the family was supreme and sole ruler and judge. Even in Rome under an organized civil government the pater familias was long left the power of life and

death over the members of his family. When families and tribes were combined in states, government was long conducted on the theory that as the individual had belonged to the family or tribe into which he was born or adopted, so he now belonged to the state, to be directed and disposed of as the state might order. What he might enjoy of life, liberty, or property was the gift of the state, subject to revocation at will. Plato reflects this theory in making Hippias declare that the measure of man's right is what the state commands. The total abolition of the liberty of innocent persons by holding them in slavery was not deemed any infringement of any right of theirs. This theory was acted upon in democratic as well as in monarchical states. Slavery was as lawful in Athens, Sparta, and republican Rome as in Persia or Egypt. True, there were rebellions and revolutions at times, but, though sometimes provoked by oppression, they were usually to acquire the power of government and not in defense of individual rights.

The Plebeians revolted to obtain a greater share in the governing power. The civil wars of Marius and Sulla were not waged for liberty but for power. In Sicily, where the slaves under Eunus had for a time wrested the governing power from their masters, they did not hesitate to enslave in turn.

The doctrine that the individual man has some rights by nature which the state ought not to disregard had no place in ancient nor medieval governments. The English Magna Charta purports to be a grant from the king and, though framed by the barons and forced upon the king, it contains no assertion of rights by nature. The rights claimed were claimed as accustomed rights previously conferred and enjoyed, such as the laws and customs of the time of Henry I. Apart from provisions as to improved methods of administration, the language of the Charter implies restoration rather than revolution.

So in the Petition of Right in the reign of Charles I, no appeal was made to natural rights,

but the demand was for accustomed privileges, for the observance by the king of the old laws and customs of the realm, especially those in force under Edward I and Edward III. In the Petition, the Charter of King John is cited, not as a schedule of the rights of man in the abstract, but as "The Great Charter of the Liberties of England," implying that the liberties therein named were not the natural heritage of men in general but the peculiar heritage of Englishmen, under English law. The prayer of the Petition is simply that the king shall accord the people of England "their rights and liberties according to the laws and statutes of the realm."

So in the Bill of Rights framed by Parliament and approved by William and Mary upon their accession to the throne, it was not asserted that the acts of James II complained of were contrary to any natural right of the subject, but that they "were utterly and directly contrary to the known laws and statutes and freedom of this realm." The purpose of the Bill of Rights was declared

by the Parliament in behalf of the people to be "for the vindicating and asserting their ancient rights and liberties." In the earlier remonstrances of the legislatures of the English colonies in America against various acts of the king and Parliament, only the accustomed rights of Englishmen were claimed to be violated. The colonists, at first, claimed as against king and Parliament no rights not accorded to Englishmen in England.

But though the notion that man has rights by nature, not granted by the state and which the state should respect as such, did not for centuries find expression in state papers or state action, it was by no means non-existent. It was early in the minds of many and found some expression in the writings of jurists and philosophers. In Rome it was a corollary of the doctrine of the existence of a *jus naturale*. The statement of that doctrine by Ulpian incorporated in the Digest implies a doctrine that man does have some rights anterior to and in-

dependent of the state. So far, however, as the statement was susceptible of that construction it was not generally acted upon and remained practically a dead letter. The doctrine itself survived, however, engaging the attention and receiving the support of various writers. It gradually gained ground among students of politics and spread rapidly after the Protestant Reformation, so-called, because of the impetus given by that event to the exercise of private judgment. As early as the 17th century, though finding little or no expression in the Petition of Right or Bill of Rights, the doctrine that individual rights were derived from nature rather than from the state was generally entertained by the Puritans and other dissenters from the Established Church, and was invoked by them to some extent as justifying the revolution of 1640. The doctrine also passed over to the Puritan Colonies in America and early found some expression there. In the Massachusetts "Body of Liberties" of 1641 there is a suggestion that the liberties, etc., therein

recited, were those demanded by "humanity, civility and christianity" rather than "accustomed" liberties. It was further asserted that these liberties were to be enjoyed by the people of the Colony and their posterity forever.

The later disputes as to the proper limits of the power of the British King and Parliament over the American Colonies led the colonial lawyers and politicians to a study of the theory of natural rights advanced by various political writers, English and Continental. It has been said, I think with truth, that the writings of Locke, Voltaire, Rousseau, Montesquieu, and even of Blackstone, were more widely read and studied in America than in Europe. The brilliant writings of Tom Paine also had great influence. The result was that the doctrine of natural rights came to be generally accepted by the people of the Colonies as the real foundation of their claims and the real justification for their resistance to the objectionable acts of the King and Parliament. In 1774 the first Continental

Congress in its Declaration of Rights declared that the people of the Colonies had those rights by "the immutable laws of nature" as well as by their charters and the principles of the English Constitution. Two years later in the Declaration of Independence the representatives of the people made no reference to their charters nor to the principles of the English Constitution as the foundation of their claims, but based them exclusively on the theory of natural rights. They declared: "We hold these truths to be self-evident, that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty and the pursuit of happiness."

The same influences undoubtedly contributed to bring about the French Revolution of 1789, and the theory of natural rights again found expression in the French state papers of that period. In August of that year, in the early stages of the Revolution, the following "Declaration of the Rights of Man and Citizen" was

put forth by the National Assembly and afterwards made the first two articles of the Constitution of 1791, viz., "Art. 1. Men are born and remain free and equal in rights. Social distinctions can be based only upon public utility. Art. 2. The aim of every political association is the preservation of the natural and imprescriptible rights of man. These rights are liberty, property, security and resistance to oppression."

Thus in the latter part of the 18th century the doctrine that man has some individual rights by nature, not by grant or prescription, and not alienable, obtained official recognition in two great nations. It has since been formally and officially iterated in the Constitutions of many American States and has been proclaimed and invoked as an impregnably established political truth. Nevertheless the doctrine is only a theory, not yet demonstrated nor undoubted. It has been assailed and in the opinion of many refuted, by Bentham, Mill, and

other utilitarian writers, the successors of Epicurus, Carneades and the Sophists. Even in France and America it is now repudiated by many and declared to be an obstacle to social and political improvement. Still, despite the vigorous arguments against the doctrine, there remains the innate feeling and a general belief that society abridges individual rights instead of conferring them. In support of this notion may be cited the fact that the statutes of any state or nation are almost wholly restrictive or compulsory in character, and rarely, if ever, permissive. From the Decalogue down, the language of the law has been compulsive, "Thou shalt" and "Thou shalt not"; and men generally act upon the theory that what society does not forbid by statute or custom the individual may do.

In passing now from the region of theory, of speculative opinion, to what seems to me the region of facts, of actual conditions, of actual traits of human nature, I wish it to be under-

stood distinctly that in what I may say about rights I am considering only the precepts of justice, and that I differentiate those precepts from the precepts of religion, charity, philanthropy, benevolence, and other similar virtues, and even those of what is loosely called humanity. If it be true as asserted by Addison that justice is the greatest and most godlike of the virtues, it does not follow that the just man, to be just, must possess all or any of the other virtues. One can be just without being religious, charitable, or philanthropic, and even without earning the reputation of being humane.

I wish further to premise that I am considering our subject only with reference to those who have grown to the age of self-maintenance and consequent freedom. I do not take into account the rights of children under that age.

With these premises borne in mind, I would now in the next chapter call attention to some propositions of fact, which I shall assume to be

established by science and history and by the reader's own experience and observation, and which I think bear more or less directly on our subject.

CHAPTER III

THE PROBLEM OF RIGHTS CONTINUED
THE NEED OF LIBERTY OF ACTION FOR THE INDIVIDUAL

MEN are endowed by nature with sundry powers, faculties, capacities, physical and mental. These, however, are not at all uniform, but are diverse in kind and degree in different races of men and in different individuals of the same race. Nature seems to work through *diversity* rather than through *uniformity*, indeed through inequality rather than through equality. Not all men are born poets, nor are all poets equally good poets. Not all men are by nature adapted for intellectual pursuits, and those who are so adapted are not in that respect equally favored by nature. Even in the field of the simplest manual labor there is great diversity of natural capacity. It seems to be

nature's theory that mankind, the human race as a whole, will be better served by diversities, by differences in kinds and degrees of powers, than by uniformity and equality.

Further, normal men are also by nature endowed, if not with rights, yet with sundry instincts, desires, passions; also with sundry feelings, emotions, sentiments, and also with some degree of reason and power of choice. Some of these may not be apparent in infancy, but they appear in a greater or less degree of intensity as the individual develops.

Among these instincts or desires is the desire to live, the desire to serve each his own welfare and that of his offspring, and the desire to decide for himself what will best serve that welfare. As a corollary, he also has by birth the desire for freedom to exercise any and all of his talents and powers in such manner, to such extent, and in pursuit of such objects as he prefers, or to be idle if he prefers idleness. Further, he has the instinct of acquisitiveness, the desire to appro-

priate to himself and retain control of such material objects as he thinks may serve his welfare and that of his offspring, and especially does he have a natural instinct and desire to possess and control exclusively for himself whatever, much or little, he has wrenched from nature or otherwise obtained by the exercise of his various powers. This instinct is also observable in some animals. A dog will hide a bone for his own exclusive future use. Man also instinctively claims for his own the natural increase of what he has acquired, the young of his beasts, the fruits of his orchard.

This desire for control includes the desire to store up, to use, to consume, to transfer, and even to destroy at will. This desire is seen in young children, who will try to clutch and hold whatever attracts them, and who will hoard or break toys or throw them away as their whims may be. As they get older the desire to control grows stronger, for they destroy less and preserve more in order to have greater measure of

control; but still they desire freedom to consume or destroy at their own will. So strong is this desire of control that men wish to direct what shall be done with their property after their death.

If one is balked or hindered in the gratification of any of these desires, there is excited in him a feeling of resentment against the cause, even if it be only some force of nature. There is a note of anger in the cries of a child over interference with his play, the deprivation of any toy or other thing he may have or desire. That the wind or the rain was the cause does not sooth him. In the mature man also, anger adds some force to the kick he gives even inanimate objects unexpectedly impeding him. Who of us has ever fallen over a chair in the dark without mentally, at least, consigning it to perdition? The old law of Deodand was an expression of this feeling of resentment against inanimate objects even. By that law, according to Blackstone, whatever chattel was the immediate cause of the death of

a reasonable creature was forfeited to the crown, as when a cart ran over a man. By the laws of Draco whatever caused a man's death by falling upon him was to be destroyed or cast out of the community. Thus a statue having fallen upon a man, it was thrown into the sea. The Mosaic law savagely declared: "If an ox gore a man that he die, the ox shall be stoned and his flesh shall not be eaten."

Is not this instinctive feeling of resentment at interference with one's person, liberty, or property, the rudiment of a later developed idea, or sentiment, of rights possessed? Resentment is felt only when one is deprived of something he feels he is entitled to. Granting that nature has not endowed man with rights, it has imbued him with a belief that he has rights, and also with a disposition to defend them.

Man is also born into a material world of natural forces, and hence to gratify his desire to live and serve his own welfare and that of his offspring, he must adapt himself to his environ-

ment, fit himself to withstand heat and cold, provide himself with food and shelter. He not only desires to, but he must, exercise his powers of mind and body and hence should be free to exercise them to that extent at least. Nature does not feed, clothe and shelter man. It only provides the raw material which man must himself find, take, and convert by his labor, manual and intellectual, into food, clothing, shelter, and whatever else he desires.

But man is also born into association with other men, into some sort of social organization, and well for him that he is. It is not society, however *ill organized*, that *has caused*, or today causes, poverty. That is the primitive condition of the human race. It is only through some social organization ensuring to man freedom for his labor and security for his savings that he can escape poverty. If each individual by his own unaided efforts had to find the raw material, mold it to serve his needs and desires, and also defend it from attacks by others, his life would

be one of dire poverty, scarcely above that of the higher animals.

Further, nature has so formed man that he not only needs but desires association with other men. Children instinctively flock together for common play, and this social instinct continues through life and extends to work as well as play. We find men everywhere in the civilized world voluntarily entering into associations for various purposes thought by the members to be of service to themselves or others. But there is over and surrounding these associations that larger association, racial or territorial, which we call society. This is the necessary association into which man is born and in which he must live if he desires other than mere animal life. This society must be maintained if the race of men, as men and not as mere animals, is to continue. Indeed, society itself has a sort of instinct for self-preservation. It is not a mere aggregation of individual units but is an association of sentient correlated

beings with a resultant life and movement of its own.

Association, however, does not extinguish nor appreciably lessen the natural instincts, desires, feelings, sentiments, etc., of the individual, though they may be made less active by continued restraint. Association even extends the scope of man's individual desires and activities. He now desires freedom to make arrangements with other men of such nature and for such purposes as he and they may agree upon. If he is prevented by authority from making such arrangements he feels some resentment, feels that *his right is infringed. He also comes to desire* that those who have entered into arrangements or contracts with him should perform their part, and he instinctively feels resentment at their neglect or refusal to do so. He feels that he has a right to the performance of the contract.

Another desire is developed or given play by society, — the desire to equal one's fellows in

the race for benefits, and, that accomplished, to excel them. He desires to win in every game, to be the victor in every contest of physical or mental powers, and in business as well as in sports. If he is held back he feels resentment against the power assuming to restrain him. He thus feels he has a right to equal and to excel if he can. Whether competition should be enforced or stimulated by society is a question in economics. What affects the question of rights and hence of justice is whether this desire to excel should be impeded.

In this association, however, each individual man finds himself in close contact all through life with other men having like instincts, desires, feelings, emotions, etc., as his own; and who also feel like resentments and have like notions of rights possessed. If each is left by society free to gratify these desires or to enforce his claims of rights in his own way unmindful how his action may affect others; if they be left free to "take who have the power" and only they may

"keep who can," society could not exist and civilization, if not the race, would perish.

Society, therefore, must frame and enforce rules for the regulation and control of the conduct of its individual members, must even restrain them to some extent from the gratification of some of their desires. On the other hand, these instincts, desires, etc., must still be reckoned with. They cannot be wholly suppressed nor even very much reduced or impeded if society is to progress or even exist. There must be left to the individual some degree of liberty of choice and action. An eminent American jurist, James C. Carter, vividly stated this, though perhaps in the extreme, when he wrote that the sole function of law and legislation is to secure to each individual the utmost liberty which he can enjoy consistently with the preservation of the like liberty to all others. "Liberty (he wrote), the first of blessings, the aspiration of every human soul, is the supreme object. Every abridgment of it demands an excuse, and the

only good excuse is the necessity of preserving it." (Carter's "Law. Its origin and growth," page 337.)

There must also be left to the individual some personal motives for labor and thrift, for, after all, it is the toil of individuals that supports society and its members. It is the surplus products, not consumed, but stored up by the economy of individuals that constitutes the energy of society. However it may be improved in the future, the nature of the average man today is such that he will not toil and deny himself without prospect of rewards to accrue to himself for his own personal use. He will not strive to earn and then conserve his earnings unless he can have them for his own, to control, use and dispose of at his pleasure. However it may be with a few unselfish, devoted souls, men as a rule are not yet so altruistic as to devote themselves exclusively to the good of others, of society. I think it evident that if the impelling natural desire to serve one's self be wholly or even largely

disregarded by society, little would be produced or saved by voluntary labor and self-denial. The alternative would be the restoration of some system of enforced labor, of slavery, for the vast majority of men. At this day, after centuries of exhortation to practise the virtues of benevolence, of brotherly love, of self-sacrifice for the good of others, men do not from pure love of humanity voluntarily endure heat and cold, expend their labor and savings in working mines, in braving seas, in building and operating factories, railroads and steamships, in growing corn and cotton. Even those public offices, in which the altruist might find the best opportunities for serving the people, are not much sought for unless some personal honor or pecuniary profit be attached to them. Should society decree that the laborer, whether with hands or brain, should have no individual reward proportionate to the efficiency of his labor, but only his numerical proportion of the product of all laborers, I fear the efficiency of all classes of laborers, manual

and mental, would fall to the "irreducible minimum."

The foregoing statements and inferences lead to the question, how far should society go in undertaking to regulate the conduct and restrict the freedom of the individual, — that freedom which would be his if he were alone in the world? It may be thought that this is a question of expediency for economists and sociologists, and so it is largely, but it is also a question of rights and hence of justice, since every action or non-action of society affects the freedom of the individual in the gratification of his desires or, in other words, in his pursuit of happiness.

CHAPTER IV

JUSTICE THE EQUILIBRIUM BETWEEN THE FREEDOM OF THE INDIVIDUAL AND THE SAFETY OF SOCIETY

THE question stated at the close of the last chapter is most important and, in a sense, is perhaps the crux of the whole matter. Not only may error in the solution of the question injuriously affect the material interests of individuals and hence of society as a whole, but it may cause unhappiness far greater than that caused by any material loss, viz., a sense of injustice. As said by the English judge, "Injustice cuts to the bone."

At the outset I accept Herbert Spencer's theory that the idea of justice contains two sentiments, positive and negative; the one the sentiment of the individual that he has the right by nature to the unimpeded use of his faculties and to the

benefits he acquires by such use; the other the consciousness that the presence of other individuals with similar claims of rights necessitates some limitation of his own claims. Out of those two sentiments is evolved, I think, the idea of justice or injustice according as they are or are not in equilibrium. They suggest the definition that justice is the equilibrium between the full freedom of the individual and the restrictions thereon necessary for the safety of society. The restraint of personal conduct within too narrow limits, the necessity of which cannot be made clear, excites resentment, stimulates angry passions, and hence causes unhappiness through a sense of injustice. Restraint within necessary limits only, the necessity of which can be seen, arouses no resentment; on the contrary, it satisfies the individual, favors harmonious cooperation, profits society and increases the happiness of its members, through the appreciation of that necessity.

But for the fixing of the boundary line between

necessary and unnecessary restraints upon personal conduct, some other matters still are to be considered. I have said that man instinctively feels resentment at interference with whatever he may think is his right to do, or get, or keep. If this interference is from any of his fellow men his resentment is greater than when it is from natural forces. There arises the desire for vengeance, the desire to "get even," — to use a common phrase, — by inflicting a corresponding injury on the offender. An eye for an eye, a tooth for a tooth, is instinctively demanded now as of old. If unable to inflict a corresponding injury there is the desire to inflict an equivalent injury. To paraphrase Bacon, revenge is justice running wild.

This instinct should be heeded by society. If it be necessary for its own preservation that society restrain this instinct, prohibit private vengeance, then it must itself provide for satisfaction of the instinct; the offender must be compelled to make full compensation or else be

made to suffer in turn some deprivation of rights claimed by him that shall be commensurate with the offense. This should be done speedily and gratuitously so far as possible. Delay and expense cause resentment in the suitor for justice and so cause injustice. In doing this, society not only protects itself but it restores an equilibrium of rights disturbed by the offender. This restoration of equilibrium is an essential element in the concept of justice. Of course, as society progresses and human nature improves, this desire of the injured for vengeance on the offender becomes weaker. The virtues of mercy, forgiveness, or willingness to forego the demand for punishment, come into play and society is allowed to attempt to reform rather than to punish, or is allowed to pardon altogether. These virtues, however, are not part of the concept of justice. If the punishment seems inadequate, or the pardon seems undeserved, there remains, or is again excited, the feeling of resentment. The equilibrium is not restored.

Another sentiment or feeling is to be reckoned with in order to secure this equilibrium in society. The young, untrained child is impatient of all restraint. It is only by experience that he learns he must submit to restraint if he would have any sort of association with his fellows. He learns that he must submit to the rules of the game if he would have a part in the game. As he comes to maturity he becomes conscious that society must impose restraint upon him and hence feels no resentment against all restraint, as does the untrained child. He does, however, feel resentment if restraints are imposed upon him in his pursuit of happiness which are not imposed upon others in their pursuit. Similarly he feels resentment if exemptions from restraint are allowed some others and not allowed him also. Furthermore, he is quick to note any discrimination against himself and prone to imagine it when in fact there is none.

Almost as soon as the average child is placed with others under a common authority, as in a

public school, he begins to complain of the teacher's partiality to other pupils. He will stay in no game where the rules operate unequally against him. He insists on an even chance with his fellow players. When later in life he engages in business he resents any favoritism shown by the government of his state or town to others in the same or a similar business. This feeling is especially noticeable in the matter of taxation. If one believes the taxes imposed by the government are unnecessarily heavy he may feel some resentment, but his resentment is much greater if he believes he is overtaxed in comparison with his fellows, that they are escaping their proportionate share of the burden, or that taxes are imposed on his products in order to favor the products of others, as when oleomargarine was taxed to handicap it in its competition with butter.

This feeling of resentment at inequality of restraints and burdens imposed and exemptions granted is not ignoble, is not a feeling to be sup-

pressed or even concealed. It is far different from the feeling of envy. If I can only afford to ride in a trolley car I may envy the man who can afford to ride in a luxurious motor car and yet not feel wronged. But if I am excluded from a public street car to which he is admitted I have a different feeling, that of resentment. I may be perfectly willing that all others, rich or poor, shall use the streets to the full extent that I do, but if it be proposed that my use shall be limited in order that some others may for their private purposes have more than an equal use with me, my feeling is not one of envy but of indignation. So I can appreciate that if I wilfully or through carelessness injure another I should make full compensation, and hence can cheerfully submit to the law compelling me to do so; but if the law undertakes to exempt any other person from a similar liability, I feel a keen sense of wrong. Conversely, the most strict disciplinarian, the martinet even, if otherwise competent receives ready obedience and respect

if it is seen that he treats alike, according to their merits, all subject to his authority. This feeling is natural. Nature is impartial in the application of its laws. It allows no exemption. Its fires burn the weak as well as the strong, the child as well as the man, the poor as well as the rich. One star differs from another star in glory, but no one of all the millions of stars is exempt from any of the laws set by nature for stars.

This feeling of right to impartiality of treatment had some faint expression in the Massachusetts "Body of Liberties" of 1641, in which it was declared that the liberties, etc., therein enumerated should be enjoyed "impartially" by all persons within the jurisdiction of the colony. It was more distinctly recognized in the Connecticut Declaration of 1818 and a part of the Connecticut Bill of Rights today, "That all men when they form a social compact are equal in rights and that no man or set of men are entitled to exclusive public emoluments or privileges from the community." Again it appears in the

federal and some state constitutions in the provision against the granting of titles of nobility. It seems to be at least impliedly recognized in the XIVth amendment to the United States Constitution in the clause that no state "shall deny any person within its jurisdiction the equal protection of the laws," since "the equal protection of the laws" necessarily implies protection against unequal laws, laws favoring some at the expense of others or of the whole. If the state favors one more than another it does deny that other equal protection. I do not subscribe to the doctrine that "the greatest good of the greatest number" is to be sought. The only legitimate search is for the good of the whole number without discrimination for or against any one. This sentiment found expression in the once popular slogan, "Equal rights for all. Special privileges for none." I say once popular, for today it would seem not popular in practice. True, special privileges are still loudly denounced, but under the name of special exemptions, they are

still demanded by those who denounce them most loudly.

It is not inequality of natural powers of body or mind, nor inequality in natural conditions, that excites this feeling of resentment I have noted. The man of feeble natural powers may envy him of strong natural powers, but he can see that society, that law, is not responsible for that inequality. If one finds himself from lack of natural ability or adaptiveness unable to accomplish what others of superior ability or adaptiveness easily accomplish, and hence he fails to receive the prize they so easily win, he may feel great disappointment and regret, but if honest with himself will not attribute his failure to the injustice of society.

It is not essential to the preservation of society and the race that such inequalities should be removed, that all men should be reduced to a dead level of capacity, that human nature should be ignored. It is strongly felt, however, that society should not itself create artificial inequal-

ities, should not allow one man or set of men a liberty it will not allow to others, should not impose burdens on one man or set of men to be borne by them alone while others are exempt; or if it does undertake to do so it should be able to demonstrate that such artificial inequality is necessary for the safety of all. The intensity of this feeling against artificial inequalities is so great that men sometimes prefer equality before the law even to liberty. When the British ambassador said to Madam De Stael that Frenchmen had no more liberty after the Revolution than before, she answered that they had acquired equality before the law and they preferred that to more liberty. This sentiment was tersely and well expressed in the French Declaration of Rights of 1795. "Equality consists in this, that the law is the same for all whether it protects or punishes."

Of course, no assertion of rights can be carried to the extent of the dictum, "Fiat Justitia ruat Respublica," for if the state fall, all hopes of

justice fall with it. When the alternative is the conquest of the particular society by invasion or its disorganization by rebellion or rioting or otherwise, some of its members must submit to the sacrifice of some or all of their rights. Nature will sacrifice individuals for the preservation of the race. Society must sometimes do the same. "Inter arma silent leges." But such times are exceptional and not within the scope of our inquiry.

To sum up the matter, justice is the according to every one his right, and that right is such freedom of action in gratifying one's desires as can be exercised in harmony with like freedom by others. In other words, it is equal freedom, equal restraint. It is order and harmony. Plato and Aristotle were right in teaching that order is an essential element of justice.

But who is to determine the matter? Who is to determine what degree of restraint or liberty is necessary to secure this order and harmony, this justice? Obviously it is society, or rather,

individuals acting as a whole through society and not each individual acting for himself, that must determine such questions. Society has the responsibility. If it imposes too many restraints or imposes them unequally it excites, as said before, resentment and antagonism, sometimes to the extent of resistance. If it imposes no more restraints than are necessary and imposes them equally, order and harmony are secured. And when we have this equal freedom with equal and only necessary restraints we have order and harmony, — in other words, justice. Indeed, to repeat, justice in some of its aspects may be considered as the desired equilibrium between the needs of society and the interests of its individual members.

I have left out of the account various virtues, — pity, sympathy, philanthropy, generosity and the like. Though these make social life more agreeable and contribute much to the sum of human happiness, they are not essential to the existence of the race or society. Society

as an organization is not held together by these virtues, though many of its weaker members might suffer and perish if they were non-existent. Allow men as much freedom of thought and action as can be exercised without interference with like freedom of others, but restrain them from exercising any greater freedom, and they can and will live together in society though they may be wholly selfish in feeling and conduct. What is called the golden rule, that we should do to others as we would have them do to us, is a precept of philanthropy, of charity, not of justice. The rule enunciated by Confucius five hundred years before Christ, the rule that we should not do to others what we would not have them do to us, is sufficient for the existence of society. The French Convention of 1793 stated the proposition in these words: "Liberty is the power that belongs to man to do whatever is not injurious to the rights of others; it has nature for its principle, justice for its rule, law for its defense: its normal limit is the maxim, Do

not to another that which you do not wish to be done to you."

This order and harmony, however, are not easily secured. Not only are there honest differences of opinion as to what restraints are necessary and how and on whom they should be imposed, but society is divided into groups or classes with interests conflicting, or thought to be conflicting, and each seeking to impose restraints on others while retaining freedom for themselves. While professing to demand more liberty and equality, they are often really insisting on greater restraint and inequality. The successful insistence of the trades-unions of England in securing from Parliament a statute exempting their funds from answering in damages for injuries caused by them is a conspicuous instance. Another and equally glaring example is the effort in this country to exempt from the law against combinations in restraint of trade, combinations to increase the cost of living by increasing the prices of agricultural products

and the prices to be paid for labor. The effort seems to be to compel men to compete in the use of their savings no matter how wasteful the competition, and to forbid men competing in the use of their labor, no matter what the idleness thereby caused. I think it a truism that whoever seeks to be exempted from the restrictions or liabilities he would impose on others, seeks not justice, but to do injustice.

Another hindrance arises out of the very virtues of pity and sympathy. These impel many to endeavor, not to persuade, but to compel the more efficient and prudent who have by their farsightedness, courage, industry and thrift made good provision for themselves and their offspring, to provide also for the inefficient and the improvident. To be asked to give to these does not offend any sense of right, but if one be told he must give he feels resentful at once. He feels he has a right to decide for himself to whom and to what extent he shall give of his savings. Society did not come into existence nor does it

now exist to correct the inequalities of nature, the inequalities of natural powers, nor to prevent the efficient and prudent receiving and enjoying the results of their efficiency and prudence. Nature itself makes no such effort. It rather tends to eliminate the less efficient and preserve the more efficient. Even if society may strive to preserve the inefficient and improvident, should it do so by hampering and restraining those wiser and more capable? We must expect nature to deal with society, with states and nations, as it does with individuals. If a state by its laws discourages the exercise to its full extent of the efficiency of the few and renders less severe the penalties for the inefficiency and imprudence of the many, it cannot long maintain any advantageous position among other nations. Whatever the precepts of religion, of philanthropy, or of other virtues may require, the precepts of justice do not require society to support men in idleness nor even to furnish them with employment. Neither do the pre-

cepts of justice require the state to furnish opportunities, nor even to establish equality of opportunity, but only equality of right to take advantage of opportunity. It is a saying, but not a fact, that opportunity knocks once at every man's door. Nature does not bring opportunities, much less equal opportunities, to men's doors. It requires men to go out and search for opportunities, or at least to be on the watch for them, as it requires men to search or watch for other things they desire; and he of the quickest perception and most farsighted will soonest see them, and when seen he does not feel any obligation to share them with others less vigilant or even less fortunate. Society does not support its members, they support it and must support it and themselves by their own exertions, find their own place, find employment for themselves, so far as the precepts of justice are concerned.

However prevalent the sentiment that more than equality of right to use his opportunities

is due to any one, it is not an instinctive sentiment. The contrary is the fact. Unless we are dominated by some other sentiment than justice, we instinctively yield assent to Aristotle's proposition that the prize flute should be awarded to the best flute player whether opulent or indigent, literate or illiterate, citizen or slave. A group of small children exploring the fields and woods for wild flowers will concede to each what flowers he finds whether by his better eyes or better luck. So with groups of small boys fishing in the streams and brooks. In games of cards for stakes, the players do not expect to hold cards of equal value and they concede the stakes to the winner, whether won by his greater skill or superior cards.

Also there is an instinctive sentiment that the evil results of one's own conduct should be borne by him alone. If one suffers loss through his own misjudgment, incapacity, or want of care, then, whatever the precepts of other virtues may require, we do not feel that justice requires us to bear any part of that loss. On the

contrary, we feel instinctively that he should bear the loss alone, that it is the natural penalty for his lack of judgment, capacity, or care. If my neighbor neglects to insure his house and loses it by fire, I see no reason why he should not bear the loss alone.

In this connection, perhaps I should not omit to notice references often made to the rights of labor, the rights of capital, property rights, and personal rights, as if they were different in their nature and importance. I do not as yet see such difference. All rights are personal rights, and the right of each to control his labor, his savings, his person, and his property is the same. I am not yet convinced that the right of the laborer to make use of his labor is superior to that of the capitalist to make use of his capital; that, whatever his greater need, the right of one without property is superior to that of one who has property; that the right to get is superior to the right to save. It is also loudly proclaimed that "property rights" are of little importance com-

pared with "human rights," unmindful of the truth that the right "of acquiring, possessing and defending property" is, as much as any other, a human right and, as such, necessary to be maintained if the race is to rise above its primitive condition of poverty. However, I do not see that the differences, if any, affect the general question of individual rights.

The conclusion I arrive at is this: Society, and with it the race, cannot survive unless it restrains to some extent individual freedom of action, nor can any particular society long survive if it carry that restraint too far. It should, *therefore, ascertain and maintain the line,* the equilibrium, between necessary freedom and necessary restraint. It is only by such action of society that justice can be established and the welfare of the race be advanced. This brings us to the question of how and by what instrumentalities society can best perform this momentous task, the securing of justice. This will be considered in the next chapter.

CHAPTER V

JUSTICE CAN BE SECURED ONLY THROUGH GOVERNMENTAL ACTION THE BEST FORM OF GOVERNMENT

IN the present state of civilization society cannot act effectively for determining and maintaining the line, the equilibrium, between necessary freedom and necessary restraint, or in short, justice, except through some governmental organization with power to define and enforce. Appeals to altruistic sentiments will not suffice. This truth was recognized by the framers of our federal and many state constitutions, in naming first among the purposes of government the establishment of justice.

Any government, however, or rather those entrusted with its administration, may through mistake or wilfulness do injustice to some of its subjects. It has often done so in the past and

the future is not free from the danger. The very possession of power excites a desire to use it, and it is an admitted characteristic of our human nature that those vested with power, political or other, are prone to exercise it unduly, to abuse it. Men in authority are often said to be "drunk with power." Hence to ensure justice the governmental organization should be such that the limits of the various powers of the government be carefully defined and its administrators be kept within those limits.

Some years ago I might have pointed to our own federal and state governments as the best in form and character for establishing justice and rested there. In later years, however, the superiority of our system is questioned, and radical changes are urged, and indeed some have been made, in the federal system and in that of some of the states. I feel, therefore, that I should make some defense of the system, believing as I do that in its general form and character it is best adapted to secure firmly as much

individual liberty of action and equality of right as is consistent with the welfare of the whole number, or, in other words, best adapted to secure justice.

It has become a familiar maxim that the functions and powers of government may all be grouped in three classes or departments, corresponding to the duties already named: (1) that of determining what rules and regulations should be observed, what restraints and duties should be imposed upon its subjects; (2) that of determining whether in a given case any of these rules, etc., have been violated, and (3) that of punishing their violation and otherwise enforcing their observance. These three groups have come to be called the three powers of government and to be designated as the legislative, judicial, and executive, though they are usually named in another order as the executive, legislative, and judicial.

The most efficient form of government for good or evil, and the quickest to act, is undoubt-

edly that in which all of these powers are united in a single individual. If that individual were always strong, yet peace-loving, self-controlled, sagacious and exclusively devoted to the welfare of his subjects, that form of government would perhaps secure them justice most surely and speedily. Such men, however, are rare and such governments have been found to be invariably and almost inevitably arbitrary in their dealings with their subjects, and in the plenitude of their power to become oppressive. While they may effectually protect their subjects from foreign aggression and domestic anarchy, their tendency is to impose burdens and restrict individual liberty more than necessary, and to disregard the innate desire of men for liberty or at least for equality of restraint. This form of government has already largely disappeared and is further disappearing, though it may again be resorted to for the restoration of order, should the present forms of government fail to prevent violence and preserve the peace.

But other forms of government have not been and are not yet wholly free from the same objectionable tendency. The vesting of all these governmental powers in a group or class of persons instead of one person has been followed by the same results. Aristocracies or oligarchies have the same tendency and even in a greater degree. They have proved even more selfish and tyrannical than the single ruler. They, like all crowds, are less sensitive in conscience, less moved by appeals to reason, than is the single individual. They offend more the sentiment of equality. The French Revolution was not so much against the king as against the nobility, who with their oppressive feudal exemptions had excited the resentment of the people at large. It was not till after he had cast in his lot with the emigrés that the king was deposed and guillotined.

Nor have pure democracies, in the few instances where they have undertaken to exercise directly all the powers of government, showed less ten-

dency to be arbitrary and inconsiderate of individual freedom and desires. The nearest approach to such a government was that of ancient Athens where the populace sent into exile, practically without trial, Aristides, called the Just, Miltiades, the victor of Marathon, and Themistocles, the victor of Salamis. The excesses of the Paris Commune of 1870 during its reign, the lynchings of today by mobs of so-called "respectable citizens" who assume the power to accuse, judge and execute all at once, indicate how much regard unrestrained democracies would have for the rights of their individual members.

Nevertheless, despite the danger of more or less arbitrariness, of more or less oppression of the individual, any government must be made strong enough perfectly to maintain order and peace among its subjects. Order is earth's as well as heaven's first law. The goddess Themis in the early Greek mythology was the goddess of order as well as the supplier of *themistes* or de-

cisions. She was present as the spirit of order in the councils of gods and men. The government that cannot or will not maintain order and peace, prevent violence and fraud, enforce individual rights and redress individual wrongs completely and promptly, is so far a failure and whatever its form should be reformed or overthrown. Even military despotism is better than disorder.

On the other hand, there must be taken into account the tendency, already mentioned, of the possessor of unlimited power over others to use it for his own benefit or pleasure at the expense of those subject to his control, where not restrained by affection or like virtues. Under all governments there has been more or less friction between the persons governing and those governed; more or less strife, sometimes culminating in rebellion and even revolution. If it be said that under a government by the people directly, a pure democracy, such as seems to be advocated at this day, there would be no distinction between governors and governed, that

all would be governors and governed alike, the answer is that in a pure democracy the governing power is and can be exercised by only a part of the people, a majority it may be, but still only a part. This part are the governors. The other part, perhaps nearly as numerous, are governed. Friction and even factious strife would still exist. Indeed, a government by a pure democracy ruling directly would probably be more arbitrary than any other, as was the case in Athens. The government by one, or that by a few, would be restrained to some extent by public opinion, would refrain from extreme measures lest they excite effectual resistance, but a majority would feel no such restraint. It would itself constitute public opinion and it would be less likely to fear resistance.

It is evident, therefore, that the frame of government should be such as to secure uniformity in its action so that it shall not act arbitrarily and unequally on its subjects. I assume that no sane man would desire to live

under any government where the wielders of the governmental power, one or many, are entirely without legal restraint. We all desire normally, not only order and peace, but also personal liberty and equality of rights. The problem, then, is how to order the frame of government so that it shall be strong enough to protect us individually as well as collectively, but not left able to oppress us or any of us. As said by Alexander Hamilton, we "must first enable the government to control the governed, and in the next place oblige it to control itself."

One great step toward such a form of government was made in the establishment of our federal and state governments by giving effect to the theory of the tripartite nature of governmental powers, entrusting each of the three to a different person or group of persons, or, in other words, to a different department, each restraining the other departments from exceeding their defined powers, so that the government, however democratic, shall not run wild. At this day,

however, even this feature of our form of government is assailed as hampering the people and their government and greatly delaying desired reforms. It may be admitted that a government with its powers thus separated in different departments is not able to act as quickly as desired by zealous persons confident of the excellence of their schemes and impatient for their realization, but, on the other hand, it is less liable to act too hastily, less liable to act arbitrarily, or to disregard individual rights and interests.

The idea of a division of governmental powers is not of recent origin. Aristotle argued that the judges should have no other political power, should not themselves enforce their decisions. In Rome under the Republic there was divided between the pretor and the judex the power to decide controversies. The pretor had other duties, but the judex was confined to the single duty to hear and determine. The framers of our Federal Constitution and of our early state constitutions did not act hastily nor unadvisedly.

BEST FORM OF GOVERNMENT

As heretofore stated, the long controversy with Great Britain over the relations between that country and her Colonies, the arbitrary acts of the British King and Parliament, caused in the Colonies a profound study of the nature of government: what should be its purposes and how best to effect its purposes and avoid its abuses. The principal men among them in each Colony were familiar with the history of governments and with the theories of government advanced by European lawyers and political philosophers. They were acquainted with the arguments of Montesquieu and others that a separation of the powers of government and the vesting of each, the executive, legislative, and judicial, in different hands was essential to liberty. They did not merely theorize, however. They had themselves lived and labored under governments not thus divided in functions or only partially so. Colonial governors had assumed legislative functions in the promulgation of ordinances, and also judicial functions as judges of probate and in other ways.

The colonial legislatures did not hesitate to dictate to the courts in particular cases and often acted as a court of appeal. In Massachusetts Bay the legislature came to be known as the General Court and exercised judicial power freely, sometimes calling in the judges to sit with them. The same individual could at one and the same time fill an executive and a legislative or judicial office. In colonial Massachusetts William Stoughton held the offices of military commander, lieutenant governor, and chief justice at the same time. Because of the frequent and prolonged absences of the titular governor he was often the acting governor. As an inevitable consequence, when sitting as a judge he was more a zealous prosecutor than an impartial judge. His conduct in the witchcraft trials was comparable to that of Jeffreys in the infamous "Bloody Assizes." Hutchinson was also often acting governor while holding his commission as chief justice.

In view of their experience and deep study,

the opinions formed by the framers of the early constitutions of this country should be of great weight in forming our own. It is worth while to cite the opinions of some. Thomas Jefferson was not in his day, nor has he been since, regarded as opposed to popular government. Virginia had as early as 1776 declared in its first constitution that the three great departments should be kept separate. Jefferson, who besides his other opportunities of observing the operation of government was himself chief magistrate of the state, criticized that constitution as not making such separation effectual. In his "Notes on Virginia" he wrote of it: "All the powers of government, legislative, executive and judiciary, result to the legislative body. The concentrating these in the same hands is precisely the definition of despotic government. It will be no alleviation that these powers will be exercised by a plurality of hands and not by a single one. One hundred and seventy-three despots would surely be as oppressive as one. Let those who

doubt it turn their eyes on the republic of Venice. As little will it avail us that they are chosen by ourselves. An elective despotism was not the government we fought for, but one which should not only be founded on free principles, but in which the powers of government should be so divided and balanced among several bodies of magistracy as that no one could transcend their legal limits without being effectually checked and restrained by the others. For this reason the convention which passed the ordinance of government laid its foundation on this basis, that the legislative, executive and judiciary departments should be separate and distinct, so that no person should exercise more than one of them at the same time. But no barrier was provided between these several powers" It was this defect, this lack of barriers, that Jefferson lamented.

When the draft of the Federal Constitution of 1787 was submitted to the states, one of the principal objections urged against it was that in its structure sufficient regard was not paid to

keeping the three departments of government separate and distinct. In reference to this objection Madison wrote in the "Federalist": "No political truth is certainly of greater intrinsic value or is stamped with the authority of more enlightened patrons of liberty than that on which this objection is founded. The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny. Were the Federal Constitution therefore really chargeable with this accumulation of powers, or with a mixture of powers having a dangerous tendency to such an accumulation, no further argument would be necessary to inspire a universal reprobation of the system." He elsewhere declared the maxim to be a "fundamental article of liberty."

Hamilton was apprehensive of danger to liberty from the legislative department and favored a strong executive to guard against it. He de-

clared in the "Federalist" that the legislative department was "everywhere extending the sphere of its activity and drawing all power into its impetuous vortex," — that the people "never seem to have recollected the danger from legislative usurpation which by assembling all power in the same hands must lead to the same tyranny as is threatened by executive usurpation." Washington in his Farewell Address, after much experience with, and observation of, legislative action, said: "The necessity of reciprocal checks in the exercise of political power by dividing and distributing it in different depositaries and constituting each the guardian of the public weal against invasions by the others has been evinced by experiments ancient and modern, some of them in our own country and under our own eyes. To preserve them must be as necessary as to institute them."

After having lived for generations under governments in which there was no effective division of powers, the people of the various

colonies in setting up their own governments at the time of the Revolution very generally declared for such division, in more or less explicit terms. Even in the few cases where the division was not expressly made, it was implied in the constitution. The provision in the constitution of Massachusetts adopted in 1780 may be cited as an example of the strength of the conviction. "In the government of this Commonwealth the legislative department shall never exercise the executive and judicial powers or either of them; the executive shall never exercise the legislative and judicial powers or either of them; the judicial *shall never exercise the legislative and executive* powers or either of them." To this provision were appended, as the reason for it, the memorable words, "To the end that it may be a government of laws and not of men."

From 1776 to the present century as new states were formed their people in most instances have adopted similar provisions. Perhaps the people of Maine when they separated from

Massachusetts in 1820 adopted the most stringent provision by prohibiting not only the departments but all the persons in either department from exercising any of the powers properly belonging to either of the other departments.

Of course some exceptions to the rule are necessary and these are usually named in the constitution itself. Again the dividing line between the powers cannot always be precisely defined and, further, each department in the performance of its own proper functions may sometimes be obliged to exercise a power strictly pertaining to another department. All that the maxim requires is that the three powers should be kept as distinct and separate as possible and have the government still go on.

It is true we should not fear to question the wisdom of our fathers, but conclusions they have arrived at in matters of government after long study, observation, and actual experience should not be disregarded unless their error can be clearly demonstrated.

CHAPTER VI

THE NECESSITY OF CONSTITUTIONAL LIMITATIONS UPON THE POWERS OF THE GOVERNMENT BILLS OF RIGHTS

IT should be evident that the division and distribution of governmental powers among different depositaries will not alone prevent encroachments by the governing power upon the liberty of the subject. The executive department in performing only executive functions can, in the absence of other checks, act oppressively. The legislative department, especially, without exceeding the legislative function, can in many ways and in excessive degrees oppress the individual by unnecessary restrictions of personal liberty, by unnecessary exactions, by arbitrary discriminations. The theory of representative government is that the legislature will be a body of men who will regard themselves as entrusted

with important powers to be exercised deliberately and wisely for the welfare of the whole commonwealth and not for any one or more classes or interests, — who will regard themselves not as mere delegates or proxies, but as representatives, like the directors of a corporation, to form and act upon their own judgment after investigation and reflection. Experience has shown, however, that members of the legislature do not always nor generally act upon that theory. They seem to be inoculated with the bacillus of irrepressible activity, the desire continually to be proposing new laws, new restrictions, new exactions. If the laws enacted prove difficult of enforcement by reason of their interference with what individuals feel to be their rights, then new and oppressive methods of enforcement are devised, still further restricting liberty and equality. I have seen it stated that in the first ten days of the session of the Massachusetts legislature this present year over a thousand laws were proposed. Further, the members of

the legislature are beset by constituents and others to favor legislative measures for their own special benefit, or that of their association, or of their locality. One result is that during every legislative session the ordinary citizen is dreading oppressive legislation and feels relieved when the session is over.

When we consider the wide, almost unlimited range of the legislative function, and the power and tendency of legislatures to push that function to the extreme, it would seem that some check should be put upon the legislature to prevent its enacting discriminatory laws or otherwise depriving the individual of some accustomed and cherished freedom of action. If it be said that public opinion is sufficient restraint, the answer is that in a democracy, or in a republic with universal suffrage, the efficient public opinion is practically that of the majority of the electorate, and it is an acknowledged truism that the unrestrained majority is even more likely than the few to be oppressive of the in-

dividual. The opinion of the many is more variable than that of the few, more likely to be swayed by sympathy, prejudice, and other emotions. Indeed, public opinion sometimes induces legislatures to enact laws which they themselves feel to be unwise and tyrannical.

If history and reason show that the happiness of the people as a whole requires certain individual liberties and rights to be left undisturbed and that the safety of the people as a whole does not require the contrary, then in order to secure justice those possessing the powers of government should be restrained from any acts infringing those liberties and rights, for, as already stated, justice consists in the equilibrium between restrictions necessary for the welfare of the whole people without discrimination, and the freedom of the individual to serve his own welfare.

I think there are such liberties and rights. The subjects of King John in the 13th century thought so and compelled the king to guarantee

by the Magna Charta that certain specified rights and liberties should not be infringed. Again, the subjects of Charles I in the 17th century had a similar conviction and expressed it in the Petition of Right, which named some liberties and rights not to be infringed. The king assented to that much limitation of the royal power. In the same century, upon the accession of William and Mary, a Bill of Rights was framed and enacted into law by King and Parliament, naming liberties and rights of the subject which ought not to be abridged. Succeeding Kings and Parliaments seem to have respected the provisions of this Bill of Rights in their legislation for British subjects. Had they conceded the claim of the people of the American Colonies that they also were protected by its provisions, the course of our political history might have been different. As it was, however, the British government practically held that neither Magna Charta, the Petition of Right, nor the Bill of Rights restrained it in its dealings with

the Colonies, and this in despite of the protests of some of its most eminent statesmen. The resolutions of the various Colonial legislatures and the formal Declaration of Independence recite many grievous instances of arbitrary action by the government in disregard of the doctrines of those charters.

So bitter was their experience that, when the people of the various Colonies came to frame constitutions for "a government of the people, by the people, and for the people" independent of the British crown and all other external authority, they very generally insisted that even such a government should have its powers defined and limited, that some rights of the individual should be specified which the government should not infringe nor have the lawful power to infringe. From their own experience the people were convinced that such definitions and limitations were necessary for the security of the individual even under a popular government.

BILLS OF RIGHTS

The first step of the representatives of the people of Virginia toward a declaration of independence of the British crown, and the setting up an independent government, was the adoption of a declaration of rights in the individual which no government should infringe. This was adopted and promulgated sometime before the constitution proper was framed. The statement was declared to be necessary in order that the government might be "effectually secured against maladministration." Similar limitations upon the powers of the government were imposed in the early constitutions of Massachusetts, New Hampshire, New Jersey, Delaware, Pennsylvania, Maryland, North Carolina, and South Carolina; also in the first constitution of Connecticut in 1818, and in the first constitution of Rhode Island in 1842. The people of New Jersey in 1844 made the limitations more definite, and the people of Maryland imposed additional limitations in 1864. The people of New York did not in their first constitution of 1777 expressly

in terms guarantee individual rights, but they impliedly did so by making the Declaration of Independence the preamble, and in their constitution of 1821 they incorporated an explicit statement of individual rights not to be infringed. The example of the original states in this respect has been followed by most of the subsequent states of the Union.

In 1778 a convention chosen to draft a constitution for Massachusetts submitted a draft to the people, who rejected it by a large majority mainly because it did not contain a "Bill of Rights." To quote from Harry A. Cushing, a writer on the History of Commonwealth Government in Massachusetts, "No demand was more general than that for a Bill of Rights which should embody the best results of experience." In 1780 a second convention submitted another draft of a constitution containing the famous Massachusetts Declaration of Rights, and this the people adopted by a majority of more than two to one. The only objection urged against

the Declaration of Rights was that it did not go far enough.

In the convention that drafted the Federal Constitution it was strongly urged that a Bill of Rights should be incorporated in the draft, but it was deemed, by the majority at least, unnecessary and even dangerous to make a specific declaration of individual rights, inasmuch as the federal government contemplated was in its very nature limited to such powers as were expressly, or by necessary implication, conferred by the Constitution, and hence to specify certain things the government should not do might be construed as permitting it to do anything not so specified. This argument prevailed and the draft submitted to the states contained no Bill of Rights. Immediately, however, a storm of objections was raised against it because of the omission. Despite the arguments of Hamilton and Madison that a Bill of Rights was unnecessary, ratification was finally obtained only by a general assurance and understanding that a sufficient Bill of Rights

should be added immediately upon the organization of the new government. The necessary amendments, therefore, were submitted at the first session of the new Congress and were unanimously adopted by the states. Other limitations have since been imposed, notably those in the XIVth amendment, assuring to every citizen equal consideration in legislation by the states.

By the Federal Constitution as it now stands the citizen, in time of peace at least, is guaranteed, among other matters, the protection of the writ of habeas corpus, freedom from bills of attainder and ex post facto legislation, freedom of religious belief and worship, freedom of thought and its expression; freedom peacefully to assemble with others and petition for redress of grievances; freedom from unreasonable searches and seizure; the right not to be prosecuted for infamous crimes except first accused by a grand jury; the right in all criminal prosecutions to a speedy and public trial by an impartial jury, to be confronted with the witnesses against him and to have

assistance of counsel; that he shall not be deprived of life, liberty, or property without due process of law; that his private property shall not be taken from him even for public use without just compensation; that the obligations accruing to him under lawful contracts shall not be impaired; that he shall not be denied the equal protection of the laws. The guarantees in the state constitutions are generally of the same nature.

It is difficult to see how any of these guaranties, or such other guaranties as may be contained in the federal and state constitutions, prevent legislative or executive action necessary for the welfare of the people generally. There is certainly an ample field for such action without overstepping these boundaries. Nevertheless, it is today urged by some impulsive persons, eager to impose their theories on the people at once, that all or many of these limitations upon the powers of government should be removed or disregarded and the majority of the people allowed unrestricted sway in all matters of governmental

action. Others who do not go so far, yet urge that the majority should be free to suspend these guaranties temporarily or in some particular classes of cases. Against this opinion I submit that after so many centuries of experience of the tendency of all governments to enlarge their powers over the subject, and of struggles to limit the powers of government over private rights and to protect the individual from governmental oppression, the burden of evidence and of argument is heavily on those who would now advocate unlimited powers even for the most democratic government. A government directly by the people is of course in practice a government by a shifting and often narrow majority of the people. It is not yet demonstrated by experience or reason that such a government, unlimited, would be as regardful of individual rights or welfare as a republican form of government with its checks and balances and constitutional restrictions. The excesses of the unlimited democracies of ancient Greece and of the unrestrained democ-

racy of France during and after the revolution of 1789 and the lynchings in this country do not contribute to such demonstration.

It is not those who defend our present form of government with its constitutional guaranties, who resist political action tending to weaken them, that should be called unprogressive, undemocratic, or wanting in love of country. Those of our ancestors, English and American, who fought for these guaranties, who obtained them only after years of strife, who incorporated them in our federal and state constitutions and safeguarded them against the varying impulses of the populace, were not unpatriotic nor unmindful of the welfare of the people, — were not indifferent to human liberties or human rights. Neither are they such who today strive to preserve those guaranties won at such expense of blood and treasure. On the contrary, it is those who would override these guaranties and revert to the old days of unlimited governmental power, that are the reactionaries.

It may be admitted that some of these limitations if enforced do now and then impede and even prevent some governmental action desired by some group or section of the people, but while action in violation of these limitations might benefit its sponsors it would necessarily be at the expense of others. Those who seek such legislation against others would quickly appeal to these limitations if legislation were directed against themselves. The noisiest declaimers against these guaranties fall back for protection upon the constitutional guaranty of freedom of speech. So long as these barriers are maintained every individual, no matter how poor and feeble, will be, theoretically at least, secure in some rights against the attacks of the many. Without such barriers every individual is at the mercy of an inconstant majority. Without such barriers justice cannot be said to be secured. Lord Treasurer Burleigh of Queen Elizabeth's time declared that England could never be ruined by its kings, but only by its

Parliament. If the safeguards of the federal and state constitutions are maintained, neither Congress nor the state legislatures can ruin America. If the American people should ever consent to the removal of these safeguards they would give evidence of their want of self-restraint, of their unwillingness and even incapacity to govern themselves, and would pave the way for the man on horseback as the French Revolution paved the way for Napoleon. To deprive a single one of his rightful liberty is to endanger the liberties of all.

CHAPTER VII

THE INTERPRETATION AND ENFORCEMENT OF CONSTITUTIONAL LIMITATIONS NECESSARILY A FUNCTION OF THE JUDICIARY

UNDER our federal and state form of government the question naturally arises where should be lodged the power to determine whether in a given instance either department has encroached on the proper field of any other department, and whether either department has encroached on the constitutional rights of the individual citizen. It should be evident that neither the executive nor the legislative department is a fit depositary of such power. Both these, from the nature of their powers, are aggressive. They act of their own volition. They initiate proceedings and measures to carry out policies. In their activities they are apt, con-

sciously or unconsciously, to overstep the boundary lines between the departments and also the limits set for the protection of the citizen against such activities. Again, questions may and often do arise between the government and the individual citizen that are not political questions, but are questions of private right, the right of the individual against the government. The disputants are the individual citizen or group of citizens on the one hand, and the government on the other whether that government be a monarchy, a republican or representative government, or a pure democracy. In such case it would seem clear that one party should not have the power to decide the question. It is an axiom that neither party to a controversy should be the judge in the matter. The legislature that enacts a statute claimed by a citizen to be beyond its powers and to deprive him of some right guaranteed to him by the constitution, should not be the judge of the question any more than should the complaining citizen. So the

executive should not be the judge where a citizen claims it has exceeded its powers to the detriment of his constitutional or statutory rights. Even if a statute be enacted or ratified by the people directly, under the modern initiative and referendum, and a citizen claims that the statute deprives him of some right guaranteed by the constitution, the people should not be the judge; much less should a majority. If the individual is left to be the judge of his constitutional or legal right as against the government, the result would be anarchy. If the government, even the most popular government, is to be the judge, the result would often be tyranny. There would be occasions, as there have been, when an excited people or majority would tyrannize over the individual, indeed over the minority. To secure alike the people against anarchy and the individual against tyranny, power must be vested in some impartial, independent arbiter to determine authoritatively and finally the relative rights and duties of each under the constitution.

The proper department to be made the depositary of this important power would seem to be the judicial. That department does not initiate, has no policies, does not act of its own volition, but acts only when its action is regularly invoked in some controversy and then only to end that controversy. It may seem unnecessary even to state, much less defend, the proposition, but as its logical result is that the judiciary when invoked by the individual must refuse effect, so far as he is concerned, to a legislative act which deprives him of some right guaranteed by the constitution, and must thus disappoint those who procured the passage of the act, the proposition has been, is still being, denied. The action of the courts in exercising that power has been and is even now denounced as usurpation. Though the proposition is now long established, these attacks justify some repetition of the argument in its support. The logic of Chief Justice Marshall in *Marbury* v. *Madison*, 1 *Cranch* 137 *at p.* 176, seems to me irresistible and

worthy of frequent quotation despite the attacks upon it. The Chief Justice said: "This original and supreme will (of a people) organizes the government and assigns to different departments their respective powers. It may either stop here, or establish certain limits not to be transcended by those departments. . . . The government of the United States is of the latter description. The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the Constitution is written. To what purpose are powers limited and to what purpose is that limitation committed to writing if these limits may at any time be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation. It is a proposition too plain to be contested, either that the Constitution controls any legislative act repugnant to it, or that the

legislature may alter the Constitution by an ordinary act. Between these alternatives there is no middle ground. The Constitution is either a superior, paramount law unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it. . . . Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be that an act of the legislature repugnant to the Constitution is void."

In 1825 that eminent jurist, Chief Justice Gibson of Pennsylvania, in a dissenting opinion in *Eakin* v. *Raub*, 12 *S & R.* 330, insisted in an able, elaborate, and exhaustive argument that while the judiciary was bound to refuse effect to a state statute in conflict with the Federal Constitution, it was bound to give it effect if repugnant only to the state constitution. He frankly ad-

mitted the logical conclusion that in such case the only remedy the citizen had to enforce his constitutional rights was that of revolution. When, however, his opinion in *Eakin* v. *Raub* was cited in 1845 in argument in *Norris* v. *Clymer*, 2 *Pa. St.* 277, he said he had changed his opinion on that question, partly "from experience of the necessity of the case." In the later case, *De Chastellux* v. *Fairchild*, 15 *Pa. St.* 18, he was emphatic in his declaration of the power and duty of the court to refuse effect to a state statute in conflict with the state constitution. In delivering the opinion of the court he used this vigorous language: "It is idle to say the authority of each branch (of the government) is defined and limited in the constitution, if there be not an independent power able and willing to enforce the limitations. . . . From its very position it is apparent that the conservative power is lodged with the judiciary, which in the exercise of its undoubted right is bound to meet every emergency."

The results of the contrary doctrine are well stated by the same court in *Perkins* v. *Philadelphia*, 156 *Pa. St.* 554. "If laws in conflict with the constitution be passed by the legislature, approved by the governor and sustained by the court, that is revolution. It is no less revolution because accomplished without great violence. It matters little to the house owner whether the structure built to shelter him be blown up by dynamite, or the foundation be pried out stone by stone with a crowbar. In either case he is houseless."

One desirable result of this doctrine that the courts when regularly invoked can and should refuse effect to an unconstitutional statute is that it ensures to every person, not in the military or naval service, the right to test in the judicial courts the authority of any official to interfere with his person, liberty, or property, whatever authority, executive or legislative, the official may plead. In France and other countries of continental Europe questions of the ex-

istence and extent of the authority of an official in his action against individuals are triable, at least at the pleasure of the executive, only in administrative tribunals, that is, courts pertaining to the executive department and instituted to assist that department in the performance of its functions. The aggrieved individual can only apply to the superiors of the official complained of. Such tribunals naturally incline to uphold the authority claimed, and indeed can lawfully allow the plea that the act complained of was ordered in pursuance of some executive policy. A recent instance is that unhappy affair at Zabern in Alsace where an army officer in time of peace wantonly struck and wounded a peaceful crippled citizen with his sabre. The victim could only appeal to the officer's military superiors, who acquitted the offender on the ground that the dignity of the military must be protected. In the United Kingdom, while at present, as for centuries, the individual can appeal to the judicial courts against officials acting under any execu-

tive or legislative orders, Parliament, and even a majority of the House of Commons, can at any time deprive him of that right. In this country the executive and legislative departments combined have no such power. So long as our present system is maintained, questions between government officials and individuals must remain cognizable by the judicial courts where the private citizen is on a par with the highest official, and the single individual is on a par with the government itself. In contrast to the Zabern affair we may note that the striking copper miners of Michigan were not obliged to apply to higher military officials for redress of wrongs claimed to have been inflicted upon them by the military. They were free to apply, and did apply, to tribunals outside of and independent of the executive. They and such as they should be the most unwilling to degrade the courts or lessen their power. A similar instance is that of the striking miners in Colorado who so loudly complained of the acts of the militia. They were not obliged to appeal

to military or executive officers for redress. The Judicial Courts were as open to them as to any others and there they would be upon an equality with the officials.

CHAPTER VIII

AN INDEPENDENT AND IMPARTIAL JUDICIARY ESSENTIAL FOR JUSTICE

FOR the judiciary to be in fact, as well as in theory, the protector of the constitutional rights of the individual against the government, and of the legal rights of the individual against the aggressions of others, it should be made so far as possible free, impartial and independent. The judges should have such security of tenure, and such security and liberality of maintenance, that they will have no occasion nor disposition to court the favor, or fear the disfavor, of any individual or class however powerful or numerous, not even the government itself. They should be made free to consider only what is the truth as to the existing law or fact in question, uninfluenced by any suggestions of what is demanded by prince, people, or individual, or by

any suggestion of consequent good or evil to themselves. This proposition to my mind is so self-evident that quotations from eminent philosophers cannot strengthen it.

The necessity of some independent tribunal between the governors and the governed was recognized in republican Rome, where it was provided that the persons of the tribunes should be inviolate, an immunity not granted to any other officials. The medieval cities of Italy frequently selected their judges from some other city that they might be free from any connection with different local factions or interests. When, however, the empire supplanted the republic in Rome, and the free cities of Italy were made subject to despotic domination, the independence of these tribunals was lost. History shows that those possessing the governmental power have always been unwilling to maintain an independent judiciary. The only countries today possessing a judiciary with any considerable degree of independence are the United Kingdom

and some of its "Dominions beyond the seas" and our own country. The need of it was seen in the experience of the people of England and of the English Colonies in America under a judiciary liable to be deprived of office or salary if its opinions were displeasing to the crown.

Charles I assented to the Petition of Right and promised to observe it, but no provision was made for any tribunal independent of the king to determine whether his acts were in violation of any article of the Petition. Consequently, when afterward in the matter of the tonnage and poundage tax Parliament remonstrated against the imposition of the tax as a violation of the royal promise in assenting to the Petition of Right, the king abruptly ended the session and in his speech of prorogation denied the right of Parliament to interpret the Petition and asserted that it was for him alone to determine "the true intent thereof." Again, the legality of the imposition by the king of the "ship money" tax without the consent of Parliament was

hopelessly questioned. The king procured from the judges an opinion that he could lawfully impose such a tax without awaiting the assent of Parliament, when necessary for the defense of the kingdom, and that he was the judge of the necessity and proper amount of the tax. But this was not the opinion of an independent judiciary. The judges at that time could be promoted, removed, or "recalled" at any time at the king's sole pleasure, and they well knew the king's obstinate insistence in the matter. Their opinion simply gave expression to the king's will, and hence inspired no respect.

Finally, for want of an independent tribunal empowered to determine authoritatively between king and subject "the true intent" of the Petition of Right, the legal extent and limitation of the royal power, the lawfulness of its exercise upon the subject in a given case, the issues between them had to be submitted to the arbitrament of civil war, with the result that the monarchical system of government was overthrown. Its

successor, an unchecked parliament, was no less arbitrary in many of its acts, and was in turn overthrown and the monarchy restored. The restored dynasty, however, obeying the impulse of all possessors of governmental powers, soon began again to claim and exercise autocratic power, to encroach upon the rights and liberties thought to have been secured to the subject by the royal assent to the Petition of Right and vindicated by successful resistance, and also to suspend the operation of the laws at his pleasure. Unfortunately again there was as yet no impartial, independent tribunal in England to determine authoritatively the line between the royal power and the specified rights of the subject. The judges were still removable at the king's sole pleasure. James II did not hesitate to use this power to obtain such opinions and decisions as he desired. Preparatory to the trial of the Quo Warranto case against the City of London to procure the forfeiture of its charter, the king removed Chief Justice Pemberton and appointed

in his place the servile Saunders who had drawn the writ in the case and had conducted all the proceedings in behalf of the crown as its counsel to the stage where the case was ready for argument in the Court of King's Bench. The case of the city was thereby made hopeless and the city itself helpless. In the case of the "Seven Bishops," prosecuted for libel in presenting to the king a petition for him to recall his order for the reading in the churches his Declaration of Indulgence, he seems to have felt tolerably sure of the court as it was already constituted. Two able and learned justices, however, Holloway and Powell, ventured the opinion that the petition was not libelous. They were both promptly "recalled."

Again force had to be used to free the subject and maintain his "rights and liberties" against the sovereign. James II was driven from the country and William of Orange called to the throne. This time the people in settling the new government through parliamentary action went

farther than before in the way of restraint upon the government and took the necessary step to secure their rights and liberties. In a new instrument, this time called a Declaration instead of a Petition, they reiterated the rights of the subject as twice before they had been formally asserted in the Magna Charta and the Petition of Right. This instrument, known as the Declaration of Rights of 1688, was presented to William and Mary, who solemnly engaged to observe and maintain its provisions. Further still (and this was the new and effective guaranty of the subject's rights), in the Act for the settlement of the crown it was enacted by king, lords, and commons that thereafter the judicial tenure of the judges of the courts should be during good behavior. Since that time for more than two centuries "the true intent" of the laws has been determined, not by king or parliament or people, but by a judiciary made strong and independent. There has been no need to resort to force to defend the legal rights of the subject.

But this security for individual rights and liberties was not extended to British subjects in America. After the Colonies had so increased in population and wealth that they were deemed worth exploitation, the government, among other means of controlling them, took over the appointment of their judges, in many instances with a tenure during the government's pleasure only. In the circular letter of Massachusetts Bay Colony to the other Colonies in 1768 they are asked to consider whether for the judges of the land not to hold their commissions during good behavior and to have their salaries appointed for them by the crown did not have a tendency to "endanger the happiness and security of the subjects." One of the counts in the indictment of July 4, 1776, against the king's government was that it had made the colonial judges dependent on the king's will alone for the tenure of their offices and the amount and payment of their salaries.

As a consequence of this experience with a

judiciary dependent on the governing power for the tenure and maintenance of its judges, the Colonies when they set up independent governments of their own provided a fixed tenure for their judges in every instance but one. Connecticut in its first constitution made the tenure during good behavior, as did Delaware, Maryland, Massachusetts, New Hampshire, North Carolina, South Carolina, and Virginia. Pennsylvania at first fixed the tenure at seven years, but in 1790 changed it to good behavior. The same tenure was fixed for the federal judges in the Federal Constitution. In some instances also, further provision was made for the independence of the judges by forbidding the diminishing of their salaries during their term of office.

The people of Massachusetts, which had been the most harried of the Colonies, declared emphatically the necessity for an independent judiciary. Article XXIX of the Massachusetts Declaration of Rights adopted in 1780 is as follows: "It is essential to the preservation of

every individual, his life, liberty and property and character that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit. It is, therefore, not only the best policy but for the security of the rights of the people and of every citizen that the judges of the supreme judicial court should hold their offices so long as they behave themselves well, and that they should have honorable salaries ascertained and established by standing laws." New Hampshire, with a similar experience, adopted the same language in Art. XXXV of her Bill of Rights. The Maryland Declaration of Rights of 1776 contains this article: "Art. XXX. That the independency and uprightness of the judges are essential to the impartial administration of justice and a great security to the rights and liberties of the people; wherefore the chancellor and judges ought to hold commissions during good behavior."

It is true that in most of the states the official tenure of the judges has since been reduced to a more or less brief term of years. This fact is only another instance of the tendency of the governing power to lower if not remove all barriers set up against it for the protection of the individual. Majorities as well as absolute kings like their own way. The change where made may have given majorities greater freedom to enforce their will upon individuals, but it has not increased confidence in the integrity of the judges nor made them more firm to ascertain and declare only the truth.

It is true also that in most states now the people have taken to themselves directly the task of selecting men suitable for judges instead of entrusting that important duty to the governor or legislature, as was the practice in the early days of the republic. I cannot think this has tended to secure better judges, though it may have secured judges more subservient to majorities. Effectually to guard the constitutional

and legal rights of all alike, the judges should possess what is called the legal mind and the judicial temperament. They should be able and learned that they may appreciate the real meaning, purpose, and scope of the constitution and statutes; calm and equable in temperament that they may not be influenced by sympathy, prejudice, or other emotions; strong and courageous in character that they may resist all pressure other than fair argument. To find the men possessing these qualities requires extensive and protracted inquiry and patient consideration, such as are not and cannot be exercised by the people directly. The task should be deputed in the first instance to the head of the state, the chief executive. He has the best means of ascertaining who possesses the requisite qualifications in the greatest degree. He would feel that he alone was responsible for a proper selection, and that feeling of responsibility would tend to make him deliberate and painstaking in his choice. On the other hand,

if the original selection be entrusted to the legislature or left with the people acting directly, individual members would have a much lower sense of personal responsibility and the individual members of the electorate scarcely any at all. True, in those states where the judges are elected by the people directly, excellent judges are often and perhaps ordinarily chosen, but I think I state a truth in stating that upon the whole those courts composed of judges with a long tenure and appointed by the executive stand higher in public estimation and their opinions have greater weight. Such courts are certainly a greater protection to those guilty of no wrong, but who have been so unfortunate as to incur the displeasure of an excited community.

Nevertheless, despite the lessons of history and the reasons contra, it is proposed in this twentieth century that the tenure of the judges shall again be during pleasure only, — this time during the pleasure of the majority of the electorate. The proposition is not stated so baldly

by its proposers. They phrase it as the right of the people to remove or recall unsatisfactory public servants, whether judges, or governors, or other officials. They propose that at the request of a certain small percentage of the electorate, setting forth their dissatisfaction with a judge, he may be removed by a majority of the voters. As precedents for their proposal they point triumphantly to the provision of the British Act of Settlement that judges should be removable by the crown upon the request of both Houses of Parliament, and to similar provisions in many of our state constitutions.

Of course, there should be lodged somewhere the power to remove judges proven to be unworthy of their high office, or incapable of performing its high duties, but it should be lodged in a body of men before whom the accused judge can appear in person or by counsel, hear the complaints and face the witnesses against him, and adduce evidence and argument in reply, — and who can on their part see the witnesses and

hear the arguments before deciding. That was the opinion of the British Parliament in the few cases presented to them, and the state legislatures in this country have generally entertained the same opinion. It was also held by Parliament that the address for removal should state the reasons therefor. In 1855 Governor Gardner of Massachusetts declined to remove a judge of probate on address by the legislature because no sufficient grounds were stated in the address. He said that in every instance then on record full reasons for removal had accompanied the address.

The constitutional provision for removal by address evidently was not designed to lessen the impartiality and independence of the judge by subjecting him to removal at the mere will of the executive and legislature, but that he might be removed for corruption, neglect of duty, incapacity, immorality, or other disgraceful conduct, after notice, hearing, and deliberation. For the executive and legislature, or even the majority of the people, to remove a judge because they

do not like his opinions as to what the constitution requires or forbids them to do, would destroy the independence of the judges and thus deprive the citizen of all security for his rights and liberties under the constitution,—would be despotism.

The principal argument for lessening the independence of the judges and making them more subservient to the inconstant majority seems to be that otherwise the judges will misuse their power and impede the operation of statutes they do not themselves approve of. The argument has little or no foundation in fact. Perhaps among the hundreds, if not thousands, of cases of holding a statute unconstitutional a few may seem to have been so decided because the judges thought them unwise and oppressive. Some expressions in judicial opinions have been unfortunate in that respect, but the courts everywhere in this country, now if not at first, disclaim any such power. The same Chief Justice Marshall, who had so convincingly stated the duty of the

judiciary to refuse effect to unconstitutional statutes, later in *McCulloch* v. *Maryland*, 4 *Wheat.* 316, disclaimed for the courts all pretensions to any power to inquire into the necessity of any statute, or in any way to interfere with the discretion of the legislature. In strong and explicit language other courts have disclaimed such pretensions. The Minnesota court in *State* v. *Corbett*, 57 *Minn.* 345, held that courts were not at liberty to declare a statute unconstitutional because it is thought by them to be unjust or oppressive, or to violate some natural, social, or political right of the citizen, unless it can be shown that such injustice is prohibited, or such rights protected, by the constitution. The Pennsylvania court in *Com.* v. *Moir*, 199 *Pa. St.* 534, used this language: "Much of the argument and nearly all the specific objections advanced are to the wisdom and propriety and to the justice of the statute and the motives supposed to have inspired its passage. With these we have nothing to do. They are beyond our province and are

considerations to be adduced solely to the legislature." The court of West Virginia in *Slack* v. *Jacob*, 8 *W. Va.* 612, said: "That the judges are convinced that a statute is contrary to natural right, absolute justice, or sound morality does not authorize them to refuse it effect." The court of Washington in *Fishing Co.* v. *George*, 28 *Wash.* 200, held that "a statute cannot be ignored by the courts because leading in its application to absurd, incongruous, or mischievous results." A few cases may also be cited showing how relentlessly this disclaimer is applied. The court of New York in *Kittinger* v. *Buffalo Traction Co.*, 160 *N. Y.* 377, held that the courts had no power to inquire into the motives inducing legislation and could not impute to the legislature any other than public motives. The Pennsylvania court in *Sunbury R.R. Co.* v. *People*, 33 *Pa. St.* 278, had urged upon it the argument that the statute in question had been "passed in fraud of the rights of the people." The court held that, if true, that fact would not authorize it to

refuse it effect. The Tennessee court in *Lynn* v. *Polk*, 76 *Tenn. St.* 121, was asked to declare a statute ineffective because its enactment was procured by bribing members of the legislature. The court held it could not do so. The Missouri court in *State* v. *Clarke*, 54 *Mo.* 17, had before it a statute authorizing the licensing of bawdy houses and was urged to declare it unconstitutional because against public policy and destructive of good morals. The court held it had no such power. The Justices of the Maine Supreme Court in an opinion reported in 103 *Maine* 508 stated the principle as follows: "It is for the legislature to determine from time to time the occasion and what laws are necessary or expedient for the defense and benefit of the people; and however inconvenienced, restricted, or even damaged particular persons and corporations may be, such general laws are to be held valid unless there can be pointed out some provision in the State or United States Constitution which clearly prohibits them."

Further, it is a maxim of the judiciary, from the beginning and now, that no statute should be refused effect unless clearly contrary to some provision of the constitution, — unless the conflict is evident beyond a reasonable doubt. This is a maxim, a canon of interpretation, that courts always have in mind and apply in considering the question of the constitutionality of a statute.

Thus scrupulous are the courts to keep within their proper sphere, to respect the limits of their powers. If the legislatures would be equally scrupulous, would themselves refrain from infringing on those rights and liberties of the citizen guaranteed by the constitution, there would be less restriction, less friction, less turmoil, less need of the judicial check, less injustice.

But the complaints against the courts are not all because of their holding statutes unconstitutional. Many have felt that courts sometimes erred in having too much respect for the legislative power and because of that respect have allowed constitutional rights and liberties to be

sacrificed at the behest of majorities and often at the behest of active, interested minorities more insistent than the inert majority. The decision of the United States Supreme Court in the *Charles River Bridge* case, 11 *Peters* 420, was mourned by such men as Webster, Kent, Story, and others as breaking down the safeguards of the constitution. The decision in the *Slaughter House* cases was regarded by many able jurists as ignoring that provision of the XIVth amendment to the Federal Constitution forbidding any denial to any one of the equal protection of the laws. The *Elevator* cases, holding that elevators were public utilities and therefore subject to public control as to charges for service, though the owners had no special franchise, no part of public power, are even now thought to have made a wide breach in the constitutional barriers against the invasion of private rights. The decision in the *Chinese Deportation* cases, 149 U. S. 698, shocked the sense of justice of many. It was to the effect that Con-

gress could empower the executive to arrest upon its own warrant any person it claimed to be an alien unlawfully residing in the United States and to deport him without trial, unless he could affirmatively prove to the satisfaction of a single judge (to be selected by the executive), and by a specified kind of evidence only, that he was not guilty, however ample and probative other evidence might be adduced and however impossible to produce the specified evidence. Justices Fuller, Field, and Brewer vigorously dissented on the ground that such action by the executive, though under the authority of Congress, was in *violation of the constitutional guaranties against* arrest without judicial warrant, against deprivation of liberty without trial by jury and due process of law.

Justice Brewer after quoting Madison, that banishment is among the severest of punishments, went on to say: "But punishment implies a trial. 'No person shall be deprived of life, liberty or property without due process of law.'

Due process of law requires that a man be heard before he is condemned, and both heard and condemned in the due and orderly procedure as recognized by the common law from time immemorial."

In my research I have found more cases where it has seemed to me the courts have construed constitutional guaranties too strictly, than where they have construed them too liberally. The tendency has been rather away from the enforcement of constitutional guaranties and to allow legislative encroachments upon them. I regard this as a very dangerous tendency. Perhaps the encroachments have not been at first perceived, but I think courts should be vigilantly on the watch for them, otherwise individual rights guaranteed to the people by the constitution may be gradually weakened and finally destroyed. This duty of the courts was declared in the case of *Boyd* v. *United States*, 116 *U. S.* 616 at page 641 — where in refusing effect to a statute requiring the production of his books

and papers by a defendant in proceedings for forfeiture, the court said: "Though the proceeding in question is devested of the aggravating effects of actual search and seizure, yet it contains their substance and essence, and effects their substantial purpose. It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy and leads to gradual depreciation of the right as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen and against any stealthy encroachments thereon. Their motto should be *obsta principiis*."

A review of the cases in which the courts have been called upon to decide whether a statute breaks over the constitutional limitation will demonstrate to any dispassionate person that upon questions of expediency, of the general welfare, or even of justice, the judges rarely if ever oppose their opinion to that of the legislators. The courts do not obstruct the current of progress; they only keep it from overflowing its banks to the devastation of the constitutional rights of the people.

CHAPTER IX

THE NECESSITY OF MAINTAINING UNDIMINISHED THE CONSTITUTIONAL LIMITATIONS AND THE POWER OF THE COURTS TO ENFORCE THEM — CONCLUSION

DESPITE the lessons of history showing the need of specified limitations upon the legislative power to ensure personal liberty and justice, it is still urged by the impatient that this check upon legislative action should be removed, or at least that the legislature should itself be the judge of the constitutionality of its acts, and that the legislatures as the representatives of the people may be trusted to observe constitutional requirements and limitations. From the beginning, however, the people of this country have not fully trusted their legislatures. They have not only set bounds to legislative power, but within those

bounds they have imposed in most instances the check of an executive veto. They have also complained of their legislatures far more loudly than they have of their courts, and latterly have subjected them to the initiative and referendum and in some instances to the recall.

Perhaps the judgment of those urging that the legislature should be trusted not to trespass on the constitutional rights of the people may be enlightened by recalling some instances of legislative action upon constitutional questions left to its decision by the constitution itself. It is hardly necessary to cite instances of the abuse of this power in the matter of determining who are entitled to seats in the legislature. It is common knowledge that, in the past at least, both law and fact have often been over-ridden for partisan advantage. As an illustration of how far a legislature will sometimes go in this direction I may cite a recent instance in Maine. The constitution of that state provides (Art. IV, Pt. 3, Sec. 11) that "no person holding any office under

the United States (post officers excepted) shall have a seat in either house of the legislature during his continuing in such office." This provision was in the original constitution of 1821, and until the legislative session of 1913 the exception of "post officers" was understood to refer to officers in the postal service and such officers often held seats in the legislature without question. In 1913, however, the House of Representatives held for awhile that the exception referred only to military officers of the United States stationed at military posts within the state, though no such officer had ever held a seat in the legislature.

That legislatures are prone to disregard constitutional provisions is also manifest in the vast amount of special legislation enacted despite constitutional prohibitions of such legislation. There are also numerous instances where legislatures while perfunctorily heeding the letter of the constitution consciously violate its spirit and evade its requirements. In many states there is a constitutional provision that no legis-

lative act shall become effective until after a specified time has elapsed from its enactment "except in cases of emergency," which emergency, however, is to be declared in the act itself. This provision, of course, is to give the people time to understand the statute and prepare to obey it. The word "emergency" in the exception implies a sudden, unexpected happening. It is defined in Webster as a "pressing necessity; an unforeseen occurrence or combination of circumstances which calls for immediate action or remedy." In Indiana in one legislative session, out of 200 acts, 155 were made to take *effect at once by a recital that an emergency* existed therefor. In Illinois a two-thirds vote of all the members elected to each house is required for the adoption of the emergency clause. Among the acts of the last session containing the emergency clause was one appropriating $600 for printing the report of a monument association. In Tennessee the exception was of cases where "the public welfare" required an

earlier date. Out of 265 laws passed at one session 230 contained the declaration that the public welfare required their going into effect immediately. In Texas the constitution provides that no bill shall be passed until it has been read on three several days in each house and free discussion allowed thereon, but that "in cases of imperative public necessity four-fifths of the house may suspend the rule." Out of 118 laws passed at one session all but five contained the statement that "imperative public necessity" required suspension of the rule.

Legislatures also seem prone to disregard the *constitutional provision for the referendum* despite the strong, explicit language of that provision. In California the constitutional provision is as follows: "No act shall go into effect until ninety days after the adjournment of the legislature which passed such act . . . except urgency measures necessary for the immediate preservation of the public peace, health or safety, passed by a two-thirds vote of all the members

elected to each house." Surely the language of the exception is strong and forceful. Two-thirds of all the members elected to each house must hold that the measure is urgent, not admitting of delay, that the public peace, health or safety, not the mere interests or convenience of individuals or localities, is threatened and that the danger is imminent, requiring immediate action. Among other instances, the legislature of California at its special session of 1911 adjudged an act to validate certain defective registrations of voters in some municipalities to be an urgency measure within the language of the exception; also an act to change the boundaries in a Reclamation District. Oregon has a similar constitutional requirement and exception which its legislature does not always observe. At the session of 1911, among other cases the legislature adjudged an act authorizing a county to levy a tax for advertising the county's resources to be within the exception; also an act dividing a road district; but an act appropriating money

to guard against the bubonic plague was not declared to be within the exception. In Oklahoma with a similar constitutional provision and exception, the legislature seems to have run riot. At the session of 1910 a very large proportion, if not a majority, of the statutes were adjudged to be within the exception. Among them was an act to pay the mileage and per diem of the members; an act providing stenographers for the Supreme Court; an act authorizing the sale of four tracts of land at public sale; an act to pay J. J. O'Rourke $238.10 for room rent. On the other hand, an act to reimburse the Governor $5000 expended by him for state purposes, and an act to reimburse a sheriff $4000 expended by him in the support of state prisoners were not so considered.

True, Oklahoma is a new and radical state, but let us turn to the extreme east, to Maine with its heritage of law-abiding traditions from the parent state of Massachusetts. Maine has also adopted the referendum in language similar to

that in the California constitution, including the exception. The state had got along quite comfortably without making Lincoln's birthday a legal holiday, but in 1909 the legislature awoke to the imminent danger to the public peace, health or safety of the state in longer delay and so established such a holiday at once without according to the people their right of review. The town of Eden, in which is situated Bar Harbor, a summer resort, had by vote for sometime excluded automobiles without any apparent danger to the public peace, health or safety, but at its last session in 1913 the legislature by a two-thirds vote of all the members elected to each house adjudged that the public peace, health or safety would be imperiled by postponing for ninety days the operation of an act authorizing a repeal of the vote.

In all the instances cited, which are but few out of many, it is difficult to see how the ninety days' postponement of the operation of the acts cited could imperil the peace, health or safety of

the public, however much it might inconvenience or annoy individuals or localities. These instances should, however, throw considerable doubt upon the proposition that the constitutional rights of the people are safe in the hands of the legislative department without the check of the judiciary. I have somewhere seen the statement that during recent years upwards of 500 acts of federal and state legislation have been held by the courts to be in violation of some constitutional provision, and that this fact should arouse the people to put some check on such exercise of the judicial power. On the *contrary, it should arouse the people to insist on* the retention of that power, and to elect wiser legislators who will more faithfully respect their oaths to observe constitutional limitations.

But another and different proposition is urged upon us. It is not to leave the legislature without check upon the tendency to disregard constitutional limitations upon its power, but to subject the judicial check itself to reversal by a majority

of that part of the electorate choosing to act on the matter. It is proposed that whenever a court of last resort shall adjudge that a statute trespasses upon the reserved constitutional rights of the individual, an appeal may be taken direct to the electorate, and that if a majority of those choosing to vote on the question desire the statute to stand, the constitution shall thereafter be held to be amended to that extent. It is submitted that such a procedure would destroy all constitutional guaranties, no matter what safeguards are attempted. Is there any assurance that such a majority would be more considerate of the individual's right to life, liberty, and property than their representatives whom they have selected or should have selected for their virtue and wisdom, and who are sworn, as well as the judges, to respect constitutional guaranties?

Under the present procedure for amendment to constitutions, propositions for amendment are first considered and debated face to face in a

legislature or constitutional convention by representatives of the people, and cannot be submitted to the people until after opportunity for full and free discussion by their representatives, and the people themselves have thereby been more or less prepared for its consideration. Even under this procedure, amendments have been adopted that the people have afterward regretted. There is now much agitation for the "short ballot," for restoring to the chief executive the power of appointment of important officials, a power at first possessed by him, but taken away by later constitutional amendments. The adoption of the "initiative and referendum" has not produced the beneficial results expected. It is found that the initiative sometimes produces defective, unworkable statutes, and that the referendum can be used to delay and even veto expedient legislation.

Under the proposed procedure the questions whether the constitution should be amended and as to the nature of the amendment are sprung

upon the people without this preliminary examination, debate and approval by their chosen representatives, and this often, if not always, in times of popular excitement. With such a procedure I can see no more stability of right, no more security for justice, than under any unlimited, absolute government.

How unstable popular sentiment may be at times may be seen in the classic example of the citizens of Rome applauding Marius and Sulla in turn with equal fervor, and in the lesser and very recent example of the voters of the city of Seattle, who elected a mayor, then soon recalled him, and but little later re-elected him by a larger majority than before. Constitutions to be of any value as bulwarks of liberty should not be immediately changeable with the popular sentiment of the day, but slowly and only after long reflection and discussion. They should contain only the results of long thought and long experience.

Legislation is ever active, ever moving this

way and that way, ever experimenting, enacting new statutes and amending and repealing old ones, now imposing fetters on individual liberty, now striking them off and perhaps imposing others. Even in England and America, where personal liberty of action is most prized, time was when statutes were enacted almost putting people and business in strait-jackets. In English Norfolk as late as Henry VIII's time no one was to "dye, shear or calender" cloth except in the town of Norwich; and no one in the northern counties was to make "worsted coverlets" except in the city of York. In the reign of Elizabeth a statute was passed forbidding the eating of meat on Wednesday and Saturdays and this not on the score of health or religion but avowedly to increase the price of fish. Statutes fixing the weight and price of loaves of bread and the size and price of a glass of ale were not formally repealed till 1824. The famous Statute of Laborers forbade laboring men to ask or receive more than a prescribed low sum for their labor and

also forbade their moving about seeking employment. The statutes against forestalling, regrating, and engrossing were not formally repealed until 1844. In early times in New England also, statutory attempts were made to fix the price of various commodities and the wages of various kinds of workmen. Men were fined for accepting higher than the prescribed wages. The Sunday laws in some places forbade walking about on Sunday except "reverently to go to and return from meeting." Everywhere was the ever present tendency of the legislative power to invade and direct every function of society, — social, religious, political, and economical. It should be noted that all these and similar statutes were under governments unrestrained by written constitutions and bills of right enforced by an independent judiciary.

Though from time to time many restrictive statutes have been modified and many repealed, other restrictive statutes have been enacted. Today the same process is going on. While

now and then restrictions and embargoes of longer or shorter standing are removed, there is still the same tendency to enact other restrictions and prohibitions. At every session of Congress and of the state legislatures measures are constantly proposed hampering in some way the freedom of the citizen in his occupation, in his pursuit of happiness. Demands are being made upon the legislative department by one class or interest for legislation to restrain other classes or interests, but for exemption for itself. In earlier times there were statutes fixing a maximum wage for labor, and though these proved ineffectual it is now proposed to fix a minimum wage, even though it should prove to be much more than the labor is worth. There are also proposed, and in many instances enacted, statutes restricting the freedom of the workman as to his output, of the employer as to his direction of his business. The natural activities of men are sought to be hampered and handicapped in vexatious ways. In illustration, I quote the

following from the "Boston Herald" of June 5, 1914:

"Twenty-five states and the United States itself forbid any discrimination by an employer against union men. Utah alone has a law to protect the non-union men from organized discrimination of union labor to drive him from his trade. Several of our states require that all public printing shall bear the union label. One extends that rule to all stationery. Twelve states require employers advertising for help to mention in the advertisement the existence of a strike. The Minnesota statute provides that, *per contra, no employer shall require any statement* from a person seeking employment as to his participation in a strike. Eight states have enacted statutes exempting labor organizations from their respective anti-trust laws. The unscrupulous employer may yet find the labor union the best means of throttling his competitors and securing a monopoly." There seems at times to be a frenzy for such legislation. Only a vivid

imagination can adequately picture what might result if Congress and the state legislatures, or the inconstant majority of the electorate, were freed from all constitutional limitations or from the check of an independent judiciary.

Though Great Britain, our mother country, has no written constitution and no judiciary empowered to enforce its limitations, it is the happy possessor of a practically homogeneous people of the Anglo-Saxon race, little affected by immigration, and imbued for centuries with a deep regard for personal liberty and private rights. Yet, even there today, statutes are demanded and sometimes enacted in derogation of them. In this country the population as the result of great immigration is more heterogeneous. It comprises races and peoples of diverse temperaments, of diverse experiences, of diverse traditions, many unschooled in self-government and lacking in that traditional reverence for liberty and order so characteristic of the Teutonic races. We even find some classes openly declaring that

if they can get possession of the government they will exploit the rest of the people for their own benefit. They essay also to bargain their votes for special legislation in their favor at the expense of the people at large and without regard to the principles of equality of right.

With such a population with its universal suffrage, were it not for our written constitutions with their Bills of Rights and with an independent judiciary to guard them, there would be no security here for personal liberty and rights. We should be in the condition of the people of France as depicted by Wm. S. Lilly in his recent book, "The New France." He wrote: "It is now more than a century since the principles of 1789 were formulated there. But in no country, not even in Russia, is individual freedom less. The state is as ubiquitous and as autocratic as under the worst Bourbon or Oriental despots. Nowhere is its hand so heavy upon the subject in every department of human life. Nowhere is the negation of the value and of the rights of

personal independence more absolute, more complete, and more effective." Yet France is a republic with manhood suffrage and with an elective legislature. But its courts are not vested with any power to conserve any rights of the people against legislative caprice.

Conclusion

The thesis I have endeavored to support in these lectures, so far as I have a thesis, is this: (1) that, after all, human justice consists in securing to each individual as much liberty of action in the exercise of his physical and mental powers and as much liberty to enjoy the fruits of such action as is consistent with like liberty for other individuals, and with such restrictions only as are necessary for the welfare of society as a whole without discrimination for or against any individual; and (2) that that justice is more firmly secured by a government with a division of powers, with a written constitution excluding from governmental interference such personal

rights as long experience has shown to be necessary both for the happiness and efficiency of the individual subject and for the welfare and efficiency of all; and (3) finally with an independent judiciary to defend those rights when assailed, as they often have been, and will be, by impatient and changeable majorities.

It may be admitted that the courts sometimes err in their interpretation of the constitution and the laws, since judges, however carefully selected, are but men; but there must be somewhere in the body politic of a free state some body of men with the power of authoritative interpretation of the fundamental law as well as other laws. Does earlier history or later experience point to any better equipped, more stable, more safe tribunal? Should not the people endeavor to raise rather than lower the position of the courts; to conserve rather than impair that freedom, impartiality, and independence of the judges declared by the people of Massachusetts in their Declaration of Rights,

after years of galling experience of the contrary, to be "essential to the preservation of every individual, his life, liberty, property and character"? Are not they the reactionaries who, despite the lessons of history, would revert to the days of a dependent, recallable, and hence timid judiciary?

But justice is not fully and certainly secured by the maintenance of particular political institutions, however excellent. Political institutions are not self-acting. They are only instrumentalities for the action of society. They are not only to be established and maintained; they are to be administered, and the best institutions may be maladministered. Even under such a system of government as I have endeavored to show to be the best yet devised to secure justice, injustice is still often suffered by the individual or by society. Oppressive statutes within the legislative power are too readily enacted. Abuses in administration are too long permitted to exist. The only remedy for these is a more enlightened

public opinion, a wider diffusion of the spirit of impartiality, a greater realization of the right and need of every person to life, liberty, and the results of his industry and economy.

Nor are the judgments of our courts always righteous. Some of the instances of unrighteous judgments result from failure to ascertain and apply the truth as to the facts of the case; some from errors in judgment; some from lack of firmness in judges in enforcing the known rights of the individual on the one hand, or those of society on the other; and perhaps a very few from incompetency or corruption. These causes can be removed to a large extent, by a more rigid insistence on skill, ability, industry, learning, and courage on the part of those assuming to administer justice as attorneys and counselors. The same insistence in the selection of judges will lessen the injustice resulting from their errors in judgment and from their lack of firmness.

There is yet another cause of injustice, the

delay and expense in obtaining even righteous judgments. It is an axiom, that justice delayed is justice denied. This delay and expense are often charged against the courts and judges, as if they had full control over judicial procedure. It is not the judges but the legislature that shapes the judicial system and prescribes the judicial procedure, so far as they are not fixed by the constitution.

It is not the courts but the legislatures that provide for so many appeals and allow so many stays and consequent delays. Judges and lawyers the country over are urging a more simplified, a more speedy, and less expensive procedure. They are also urging the establishment of more courts with more judges to cope with the constantly increasing litigation, in order that the wrongs against the individual and the wrongs against society may be redressed with a minimum of delay and cost. It is the legislatures that hesitate and often it is the legislatures that tie the hands of the judges. In some states it is

sought to deprive the judges of their proper influence in jury trials. In some states it is even sought to prevent them from saying more than yes or no to proposed instructions to a jury. In many states nearly the whole matter of procedure, its various steps, are fixed by statute and become difficult of improvement. If courts could have more power and the legislatures would interfere less in matters of procedure, I am sure the cause of justice would be better served.

In conclusion, perfect justice may not be attainable by us imperfect men. As said by Addison, "omniscience and omnipotence are requisite for its full attainment." Yet it is our duty and especially the duty of those of the legal profession to attain to such approximation as may be possible. No more noble work can engage our powers; no greater service can be rendered mankind. I do not except the endowment of schools, colleges, libraries, and the like, nor the endowment of hospitals and other charitable institutions. Great as are the virtues of

charity, benevolence, philanthropy, piety and the like, justice is a yet greater virtue. To quote Addison again, "There is no virtue so truly great and godlike as justice"; and in the words of Daniel Webster's eulogy: "Whoever labors on this edifice of justice, clears its foundations, strengthens its pillars, adorns its entablatures, or contributes to raise its august dome still higher in the skies, connects himself in name, fame, and character with that which is, and must be, as durable as the frame of human society."